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No:

IN THE
Supreme Court of the United States

LAKEISHA WILSON-BEY
Petitioner

v.

UNITED STATES OF AMERICA

On Petition For Writ Of Certiorari
To The District of Columbia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are the Fifth, Sixth and Fourteenth Amendments violated by failing to set aside a defendant's conviction based on alternative theories, where one of the theories has been found unconstitutional because of the jury instruction and it is unclear the theory relied on in entering the guilty verdict.

2. Are the Fifth, Sixth and Fourteenth Amendments violated by conducting a harmless beyond a reasonable doubt analysis without answering in the affirmative that the guilty verdict was surely unattributable to the erroneous instruction

PARTIES TO THE PROCEEDING

1. Lakeisha Wilson-Bey
2. Sckeena Marbury
2. United States of America

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JURISDICTION

The en banc opinion of the District of Columbia Court of Appeals was issued on July 20, 2006. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

FIFTH AMENDMENT: "No person shall be held to answer for a capital offense, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actial service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in an criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

SIXTH AMENDMENT: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

FOURTEENTH AMENDMENT, Section I: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The events started on the evening of January 16, 2000, when an argument broke out between Ms. Marbury and Ms. Blackwell which led to a fight in front of the building that Ms. Blackwell won. Tr. 10/30 at 119-20. Ms. Marbury was severely beaten by Ms Blackwell. Id at 123-24. At Ms. Horsley's house, a group of Ms. Marbury's friends assembled, including Ms. Horsely, Ms. Loney, Ms. Tabbs, and Angel Lewis. The five women armed themselves with knives and baseball bats and drove to Ms. Wilson-Bey's home. Witnesses gave conflicting accounts of what happened in Ms. Wilson-Bey's home. According to Ms. Horsley and Ms. Tabbs, all five women went into the apartment, where Ms. Wilson-Bey brandished a knife and threatened to kill Ms. Blackwell. 10/24 Tr. At 137-38(Horsley); 11/2 Tr. At 397-400 (Tabbs). Angel Lewis testified however, that she was never in the apartment and did not see Ms. Wilson-Bey with a knife. (10/25 Tr. 428-29). Ms. Loney testified that she was in the apartment but never heard the supposed threat. 11/1 Tr. At 192. She also testified that only one other woman went into the apartment with her and she was not sure if it was Ms. Marbury. Id at 188-90.

The group now numbering eight returned to Ms. Horsley's house from where they drove to 108 Atlantic Street. Ms. Horsley, Angel Lewis, and Shamica Lewis each testified that the intention of the group was to "fight" the women whom they believed has "jumped" Ms. Marbury. (10/24 Tr. 125, 127-29, 135-36, 144 (Crystal Horsley); 10/25 Tr. 420, 434 (Angel Lewis); 10/19 Tr 272 (Shamica Lewis). None of the government witnesses testified that there was a specific plan to kill Ms. Blackwell and they expressly denied any intent to kill. See *Wilson-Bey v. United States*, 903 A.2d 818, 845(en banc D.C. 2006)[1]; (10/25 Tr. 361, 370.

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[1] The Court stated "But even if we assume that Ms. Marbury had

Mr. Arnold Rucker, Ms. Blackwell's boyfriend, testified that he opened the door to the apartment and observed several women at the door asking whether Ms. Blackwell was at home. Mr. Rucker testified that he observed a light skinned female, five-feet four inches tall holding "the biggest sized knife that come in the set." (10/31/00 Tr. 338). Witnesses testified that Ms. Wilson-Bey had a big butcher knife measuring 8" to 10" in length and 2" to 2½" in width. (10/24/00 Tr. 138; 11/02/00 Tr. 314-315, 358). While the girls were at the door asking for Tamika Blackwell, Ms. Blackwell came up behind Mr. Rucker and said "Here I am." (10/31/00 Tr. 345). Ms. Blackwell immediately pushed Mr. Rucker out of her way and started swinging. (10/26/00 Tr. 31-32, 111-13, 11/02/00 Tr. 353-58, 361-62, 413-15). Ms. Blackwell pushed the small light-skinned female with ponytail to the ground, and was beating her. (10/31/00 Tr. 347-48). Mr. Rucker testified that after sometime "Tomika got up, and she was holding her neck and she - - she went in the living room and sat down on the floor and she said –she said, "those bitches stabbed me." Then she said, "this is my third time getting stabbed. I'm going to die this time." (10/31/00 Tr. 354). Ms. Blackwell was on top of the light-skinned female with ponytail when she was stabbed and Mr. Rucker did not see the person that stabbed her. Immediately Ms. Blackwell got up and walked in the apartment, the girls ran out of the building when Crystal shouted that the boy had a gun. (10/26/00 Tr. 33-34).

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the capacity to form the requisite specific intent and to deliberate upon and premeditate a murder. the "cooperating witnesses" testified that appellants and their friends went to Ms. Blackwell's house to find out why Ms. Marbury was beaten up and to fight the decedent and her friends. None testified that there was any plan to kill Ms. Blackwell. and one of the women explicitly denied that the group harbored an intent to kill.

All eight of the women in the group were charged with first-degree premeditated murder and five of them pled guilty to comparatively minor charges in exchange for their agreement to testify against Ms. Wilson-Bey and her sister/co-defendant, Sckeena Marbury. Ms. Wilson Bey and Ms. Marbury were charged with: (1) Conspiracy to assault and murder Tamika Blackwell and to assault Teresa Brown and Diamonika Thompson in violation of D.C. Code §§22-501, 2401 and 3202; (2) First Degree murder of Tamika Blackwell while armed (premeditated) in violation of D.C. Code §22-2401, 3202; (3) Assault with intent to kill while armed, in violation of D.C. Code §22-501, 3202); (4) aggravated assault while armed in violation of D.C. Code §§22-504.1, 3202); (5) destroying property in violation of D.C. Code §22-403; (6) threatening to injure a person in violation of D.C. Code §22-2307; and (7) carrying a dangerous weapon in violation of D.C. Code §§22-3204(a).

The government in its opening statement asserted that Ms. Wilson-Bey was the principal actor. (10/19/00 Tr. 225-26). The government's case consists primarily of the testimony of three co-operating witnesses and Mr. Rucker. The three cooperating witnesses testified that Ms. Wilson-Bey stabbed Ms. Blackwell several times with a butcher knife. (10/25/00 Tr. 451-53)[2]. The witnesses also testified that there was no plan or agreement to kill or intention to kill Tamika Blackwell or anyone. (10/19/00 Tr. 272-275; 10/24/00 Tr. 125, 127-129, 144; 10/25/00 Tr. 421, 433-35, 11/02/00 Tr. 386-87, 401).

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[2] Ms. Tabbs was impeached with her statement to the police that she did see Ms. Wilson-Bey stab Ms. Blackwell. (11/02/00 Tr. 309). The testimonies that Ms. Wilson-Bey was seen plunging her knife into Ms Blackwell are contradicted by the number and nature of the injuries to Ms. Blackwell. There were only three stab wounds on Ms. Blackwell and none caused by the knife alleged to be in possession of Ms. Wilson-Bey

The evidence demonstrates that Ms. Wilson-Bey did not inflict any of the fatal wounds to Ms. Blackwell. The evidence and testimonies elicited at trial clearly established that Tomika Blackwell sustained three (3) stab wounds from two knives. One measuring about half (1/2) inch wide and the other about one (1) inch wide. (10/26/00 Tr. 161-163; 11/02/00 Tr. 465-66)). According to the medical examiner that testified for the government and Petitioner's forensic pathologist, Tomika Blackwell's death was as a result of the stab wound #3 caused by the knife with a half (1/2) inch blade, which does not correspond with the width of the knife allegedly possessed by Petitioner. (10/26/00 Tr. 161-163; 11/02/00 Tr. 465-66). It is undisputed that the evidence presented at trial showed that Petitioner allegedly possessed a butcher knife with two (2) inch wide blade, which is clearly bigger that the half (1/2) inch knife that inflicted the fatal wound to Tomika Blackwell. (11/02/00 Tr. 314-316). Therefore, the knife allegedly possessed by Ms. Wilson-Bey, did not cause non-fatal stab wounds #1 and #2, or fatal stab wound #3 that caused the death of Tomika Blackwell. Moreover, Mr. Rucker testimony that Ms. Blackwell was on top of Ms. Wilson-Bey when she was stabbed, made it impossible for Ms. Wilson-Bey to be the person that stabbed Ms. Blackwell. According to Dr. Hameli , expert witness for Petitioner, Ms. Wilson-Bey as a right-handed person on the floor with Ms. Blackwell on top of her could not have inflicted the injuries on Ms. Blackwell. (10/31/00 Tr. 400-401, 407; 11/02/00 Tr. 459-467; 473-78).

The court gave the jury instructions on aiding and abetting over defendants' objection. (11/06/00 Tr. 181; 11/07/00 Tr. 193-206, 243-45, 265-66). The Courts instruction states in pertinent part:

> *It is not necessary that the defendant have had the same intent that the principal offender had when the crime was committed* or that she

> have intended to commit the particular crime by the principal offender. An aider and abettor is legally responsible for the acts of other persons *that are the natural and probable consequences of the crime or criminal venture in which she intentionally participates.*

The Court did not advise the jury that the aiding and abetting instruction was inapplicable to Ms. Wilson-Bey. The government in its closing statement expanded its theory of the case that Ms. Wilson-Bey was the person that stabbed Ms. Blackwell causing her death (11/07/00 Tr. 290-91) to include aiding and abetting. The government argued that if the jury was unable to convict Ms. Wilson-Bey as the principal, she should be convicted on the theory of aiding and abetting. (11/07/00 Tr. 307-310).

The jury returned guilty verdict on six of the seven counts in the indictment. The jury returned a not guilty verdict on the charge of assault with intent to kill Arnold Rucker but returned a guilty verdict on the lesser-included offense of assault with a dangerous weapon. (11/08/00 Tr. 464-69). The jury was given a transferred intent instruction with respect to the assault with intent to kill Arnold Rucker.

On appeal, the decision of a division of the District of Columbia Court of Appeals entered on April 7, 2005, relied principally on the *Daniels v. United States*, 738 A.2d 240, 246-47 (D.C. 1999) and *Byrd v. United States*, 364 A.2d 1215, 1219 (D.C. 1976) in rejecting Petitioner's claim that the "trial judge instructed the jury erroneously with respect to the intent element of "aiding and abetting" first degree premeditated murder." The opinion further suggested that the outcome may have been different if the Court had not been constrained or limited to follow the prior holding in the aforestated cases. For that reason, the division was of the opinion that an en banc review may be necessary in this case.

Wilson-Bey v. United States, 871 A.2d 1155, 1166 (D.C. 2005).

On rehearing en banc, District of Columbia Court of Appeals held

> "that trial court's instruction regarding the requisite intent was erroneous, for in any prosecution for premeditated murder, whether the defendant is charged as a principal or as an aider and abettor, the government must prove all the elements of the offense, including premeditation, deliberation, and intent to kill. Because the instruction given in this case omitted the mens rea element of the offense charged, the error was of constitutional magnitude. Concluding that the erroneous instruction was prejudicial as to Ms. Marbury but harmless beyond a reasonable doubt as to Ms. Wilson..." *Wilson-Bey v. United States*, 903 A.2d 818, 822 (re hearing en banc D.C. 2006).
>
> District of Columbia Court of Appeals affirmed Ms. Wilson-Bey's first degree murder conviction on the premise that "any impartial trier of fact who credited the prosecution's evidence would, in our view, be bound to conclude that Ms. Wilson-Bey intended to kill the decedent, tried to kill her, and succeeded in doing so, either by personally causing her death or by abetting a knife-wielding confederate who actually inflicted the fatal wound if Ms. Wilson-Bey did not." *Id* at 846-47.

The Court as a basis that government's evidence was

uncontradicted and accepted by the jury cited to Petitioner's conviction for aggravated assault[3] but the court did not find it significant that Ms. Wilson-Bey was acquitted of ***assault with intent to kill***, which is the only charge properly instructed that had a specific intent to kill requirement. The Court, although stating in general terms that the error was harmless beyond a reasonable doubt stated in footnote 50 that

> '[I]f the jury reached the aiding and abetting theory as to Ms. Wilson-Bey, the natural and probable consequences instruction obviously permitted conviction upon less evidence than an instruction requiring proof of deliberation and premeditation would have done. We discern no reasonable doubt, however, that the outcome under a correct instruction would have been the same."

REASONS FOR GRANTING THE WRIT

(1) The Court should grant the writ to determine whether the 6th and 14th Amendments are violated by affirming conviction of a defendant when the case was submitted to the jury on alternative theories as a principal or as an aider and abettor and the instruction of aiding and abetting was found to be unconstitutional. The Court has held that when a case is submitted to the jury on alternative theories, the unconstitutionality of any of the theories required that the conviction be set

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[3] Id pg 847 at fn 49 the court stated "the conviction of both Petitioners of, *inter alia*, aggravated assault while armed demonstrate that the jury accepted the largely uncontradicted testimony of the government's witnesses regarding the manner in which the crime was committed.

aside. Because the Court has not expressly applied this in a case where a defendant was charged on alternative theories as a principal or as an aider and abettor, the District of Columbia, failed to set aside a conviction after finding its aiding and abetting instruction unconstitutional.

The Court has not yet addressed whether a defendant's due process is violated when a law is changed as to one of the theories under which the defendant was convicted and the conviction is not set aside. But it has made it crystal clear that "when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." Sandstrom v. Montana, 442 U.S. 510 (1979) (citing *Stromberg v. California*, 283 U.S. 359 (1931)).

Several disadvantages arise when a case is submitted to the jury on alternative theories and the jury convicts without any indication of which theory it relied on.

I. THE CONVICTION SHOULD BE SET ASIDE JUST AS IN CASES WHERE ONE ALTERNATIVE THEORY OF CONVICTION HAS BEEN FOUND UNCONSTITUTIONAL

The prejudice from instructing the jury on alternative theories that the jury may rely on in rendering a verdict is great where the verdict is of a general nature that does not specify if the defendant was convicted as a principal or as an aider and abettor. The aiding and abetting instruction in the case at bar which was invalidated by the District of Columbia Court of Appeals sitting *en banc*, omitted the *mens rea* element first-degree premeditated murder under the theory of aiding and abetting. Specifically, the instruction "conflicts with the overriding presumption of innocence with which the law endows the accused and which extends to every element

of the crime," Morissette v. United States, 342 U.S. 246, 275 (1952), and it "[invade the] fact-finding function," United States v. United States Gypsum Co., 438 U.S. 422, 446 (1978), which in a criminal case the law assigns to the jury.

The Supreme Court has gone so far as to recognize in Stromberg v. California, 283 U.S. 359 (1931) that "[a] conviction must be set aside where the verdict of guilty did not specify the ground upon which it rested and the jury were instructed that their verdict might be given with respect to any one of the three clauses of the statute the violation of which was charged, and one of such clauses is unconstitutional." See also Bachellar v. Maryland, 397 U.S. 564, 571 (1970). In these cases such as the instant case, the jury is clearly instructed by the trial court that it may convict a defendant on an impermissible legal theory, as well as on a proper theory or theories. Although it is possible that the guilty verdict may have had a proper basis, it is likely as in this case that the verdict rested the changed unconstitutional ground, and this Court "have declined to choose between two such likely possibilities." Boyd v. California, 494 U.S. 370, 380 (1990).

So too, in the instant matter the jury verdict should have been set aside since the jury did not specify whether Ms. Wilson-Bey was convicted as a principal or as an aider and abettor and the aiding and abetting instruction was subsequently declared unconstitutional. This Court must grant certiorari.

(2) The Court should grant the writ to determine whether the due process clause is violated by affirming a conviction as harmless beyond a reasonable doubt where the jury verdict is attributable to an instructional error that was unconstitutional.

This Court has made it clear that "before an error involving the denial of constitutional rights can be held harmless in a state criminal case, the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction." Chapman v. California, 386 U.S. 18, 24 (1967). The Court has held that the inquiry in a harmless error review is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in the trial was surely unattributable to the error. See e.g. Sullivan v. Louisiana, 508 U.S. 257 (1993)..

I THE RESTRICTION THAT THE GUILTY VERDICT WAS SURELY UNATTRIBUTABLE TO THE ERROR IF APPLIED TO THE INSTANT CASE SHOWS THAT THE ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT

The Distict of Columbia Court of Appeals concluded that "as to Ms. Wilson-Bey, the instructional error was harmless beyond a reasonable doubt and that revision of the instruction on aiding and abetting to conform to the standard that we have now adopted would not have affected the jury's verdict as to her." Lakeisha Wilson-Bey v. United States, 903 A.2d 818, 847 (D.C. 2006). The ruling of the *en banc* Court with respect to Ms. Wilson-Bey is inconsistent with its analysis and the evidence it considered. It is undisputed that in order for the aiding and abetting instruction not to apply to Ms. Wilson-Bey, the jury must convict Ms. Wilson-Bey as the principal or at the very least; the evidence presented would have to be sufficient to establish that Ms. Wilson-Bey was the principal. However, the record does not show that Ms. Wilson-Bey was convicted as a principal in the killing of Ms. Blackwell. This is buttressed by the fact that the District of Columbia Court of Appeals recognized that "[s]ome doubt was cast by the medical evidence, however, on the government's theory that it was Ms. Wilson-Bey who

inflicted the fatal blow." Id. at 846. Moreover, the *en banc* Court recognized that Ms. Wilson-Bey may have been convicted as either a principal or an aider and abettor.[4] Additionally, the Court went as far as recognizing that "the prosecutor also told the jury that both appellants [Wilson-Bey and Marbury] could be found guilty on an aiding and abetting theory." Id. (emphasis added).

The Supreme Court has expressed the standard for a harmless error analysis. In Sullivan v. Louisiana, 508 U.S. 257 (1993), the Court recognized that the harmless error review looks to the basis on which the jury actually rested its verdict, in other words, it is not whether in a trial that occurred without a the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in the trial in question was surely unattributable to the error. Id. at 279 (analyzing Chapman, et al. v. California, 386 U.S. 18 (1967) and its progeny).

It is clear that the *en banc* Court is in doubt as to whether the jury convicted Ms. Wilson-Bey as a principal or as an aider or abettor using the invalidated instruction, and

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[4] The Court stated "Any impartial trier of fact who credited the prosecution's evidence would, in our view, be bound to conclude that Ms. Wilson-Bey intended to kill the decedent, tried to kill her, and succeeded in doing so, either by **personally causing her death or by abetting a knife-wielding confederate who actually inflicted the fatal wound if Ms. Wilson-Bey did not.**" Wilson-Bey, 903 A.2d at 846-47 (emphasis added). This conclusion that Ms. Wilson-Bey intended to kill the decedent is in clear contradiction of the *en banc* Court's factual finding that "the 'cooperating witnesses' testified that appellants [Wilson-Bey and Marbury] and their friends went to Ms. Blackwell's house to find out why Ms. Marbury was beaten up and to fight the decedent and her friends. None testified that there was any plan to kill Ms. Blackwell, and one of the women explicitly denied that the group harbored an intent to kill" Id. at 845.

"to hypothesize a guilty verdict . . . would violate the jury trial guarantee. Id. at 279 (citing Rose v. Clark, 478 U.S. 570, 578 (1986). The *en banc* Court's refused to consider this Court's instruction that the "guilty verdict actually rendered in this trial was surely unattributable to the error." Id. at 279. The *en banc* Court's conclusion that the instructional error was harmless beyond a reasonable doubt, without consideration that Ms. Wilson-Bey may not have been found guilty as an aider and abettor, deprived Ms. Wilson-Bey of her right to due process as guaranteed by the 6th and 14th Amendments to the United States Constitution. This Court must grant certiorari.

II: THE JURY DID NOT BELIEVE THAT MS. WILSON-BEY HAD A SPECIFIC INTENT TO KILL MS. BLACKWELL BASED ON THE NOT GUILTY VERDICT ON THE CHARGE OF ASSAULT WITH INTENT TO KILL WHILE ARMED.

In the case *sub judice*, Ms. Wilson-Bey was charged with assault with intent to kill Arnold Rucker and the trial court gave the jury instruction on transferred intent. If the jury had believed that Petitioner had the intent to kill Ms. Blackwell as the District of Columbia Court of Appeals concluded, the jury would have found petitioner guilty of assault with intent to kill since petitioner's intent to kill Ms. Blackwell would be transferred to the assault on Arnold Rucker. This assertion is supported by the fact that the jury instead found petitioner guilty of a lesser-included offense of assault with a deadly weapon. This clearly demonstrates that the government did not prove specific intent to kill as well as premeditation and deliberation but that the jury convicted petitioner based on the erroneous aiding and abetting instruction. The en banc opinion used petitioners conviction of aggravated assault while armed as conclusive proof that government's evidence was uncontradicted and accepted by the jury but the court did not find it significant that petitioner was acquitted of

assault ***with intent to kill*** while armed.

The jury returned a verdict of not guilty with respect to assault with intent to kill but found petitioner guilty of the lesser-included offense of assault with a deadly weapon. The evidence adduced at trial both from government and defense witnesses show that the object of the group and petitioner was to "go down there to fight the girls" (10/24 Tr. 129, 135, 148; 10/25 Tr. 432). The en banc court in its opinion agrees that the group did not have an intent to kill and on that basis found that the co-defendant, Ms. Marbury, did not have a specific intent to kill and thus was prejudiced by the erroneous aiding and abetting jury instruction. The en banc court in applying harmless error beyond a reasonable doubt analysis to Ms. Wilson-Bey did not apply its conclusion that the testimony of the cooperating witnesses demonstrate that the group did not intend to kill Ms. Blackwell.

The intention of the principal that caused the death of Ms. Blackwell is unknown since Ms. Wilson-Bey did not strike the fatal blow. Despite the conclusion in the opinion of the District of Columbia Court of Appeals labeling Ms. Wilson-Bey the person with intent to kill Ms. Blackwell, the witnesses testified that there was no plan or agreement to kill or intent to kill Tamika Blackwell or anyone.[5] (10/19/00 Tr. 272-275; 10/24/00 Tr. 125, 127-129, 144; 10/25/00 Tr. 421, 433-35, 11/02/00 Tr. 386-87, 401).

The government as proof of Ms. Wilson-Bey's specific intent to kill Ms. Blackwell relies on the testimony by Crystal Horsley[6] and Ms. Tabbs that Ms. Wilson-Bey

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[5] Angel Lewis testified that they had previously agreed to go "down Atlantic Street to fuck her up" in the absence of Ms. Wilson-Bey. However, Ms Lewis explained that it meant they were going to fight them. 10/25/00 Tr. 421, 431-432. Ms. Wilson-Bey was not the only person seen by witnesses fighting Ms. Blackwell. (10/31/00 Tr. 401-404).

[6] Government alleges that Ms. Wilson-Bey stated inside her

said that she will "kill that bitch". (10/24/00 Tr. 141-143). However, their testimony was contradicted by the testimony of Angel Lewis and Ms. Loney that Ms. Wilson-Bey never threatened to kill Ms. Blackwell in their presence and that Ms. Tabbs and Crystal Horsley were not inside Ms Wilson-Bey's apartment with them. (10/25/00 Tr. 427-29; 11/01/00 Tr. 192). Notwithstanding, Ms. Tabbs explained Ms. Wilson-Bey's intent was to go fight the group that jumped Ms. Marbury. (11/02/00 Tr. 401)[7].

The jury was given transferred intent instruction but the jury still did not return a verdict on assault with intent to kill because they believed that Ms. Wilson-Bey did not have the intent to kill Ms. Blackwell at the time of the commission of the offense, which is consistent with the testimony of witnesses as to the purpose of their visit with Ms. Blackwell. It is without question that the jury found petitioner guilty of first degree murder because it was a natural and probable consequence of the assault or fight with Tamika Blackwell as the jury was made to believe based on the aiding and abetting instruction.

The government realized the improbability that Ms. Wilson-Bey will be convicted as a principal and urged the jury to convict Ms. Wilson-Bey on the theory of aiding and

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apartment in the presence of Angel Lewis, Marbury, Loney, Horsley, and Tabbs "I am going to kill that bitch". However, Ms. Loney testified that only two people went into the apartment and that she did not hear Ms. Wilson-Bey say that she will kill Ms. Blackwell. (11/01/00 Rr. 192; 11/02/00 Tr. 264).

[7] Ms. Tabbs during cross examination by the government testified as follows:

Q. "...The bottom line is, you knew where you all were going and what Kisha wanted to do when she got there: right."

R. Yes. She was going to fight her."

Clearly, Ms. Tabbs like all the witnesses knew that the alleged statement meant fighting the group and not killing them.

abetting, if they are unable to convict her as the principal. (11/07/00 Tr. 307-310). Surely, the jury did convict on the theory of aiding and abetting because it viewed the death of Ms. Blackwell as the natural and probable consequence of there intended fight with Ms. Blackwell.

CONCLUSION

For the foregoing reasons, this Court must grant certiorari.

Respectfully submitted,
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LAKEISHA WILSON-BEY, APPELLANT,
v.
UNITED STATES, APPELLEE., and

SCKEENA MARBURY, APPELLANT,
v.
UNITED STATES, APPELLEE.

Nos. 01-CF-293 and 01-CF-633

DISTRICT OF COLUMBIA COURT OF APPEALS

March 20, 2006, Argued En Banc
July 20, 2006, Decided

SUBSEQUENT HISTORY: As Corrected July 26, 2006.

PRIOR HISTORY: Appeals from the Superior Court of the District of Columbia. (F-504-00 and F-505-00). (Hon. Russell F. Canan, Trial Judge). *Wilson-Bey v. United States, 871 A.2d 1155, 2005 D.C. App. LEXIS 149 (D.C., 2005)*

COUNSEL: John O. Iweanoge, Jr., for appellant Lakeisha Wilson-Bey.

Matthew M. Hoffman, with whom John Moustakas and Stephen R. Galoob were on the brief, for appellant Sckeena Marbury.

David B. Goodhand, Assistant United States Attorney, with whom Kenneth L. Wainstein, United States Attorney, and Roy W. McLeese III and Lynn C. Holliday, Assistant United States Attorneys, were on the brief, for appellee.

Andrea Roth, with whom James Klein and Samia Fam were on the brief, for Public Defender Service, amicus curiae.

JUDGES: Before WASHINGTON, Chief Judge, FARRELL, RUIZ, REID, GLICKMAN, and KRAMER, Associate Judges, and WAGNER and SCHWELB,* Senior Judges.

* Judge Schwelb was an Associate Judge of the court at the time of argument. His status changed to Senior Judge on June 24, 2006.

OPINION BY: SCHWELB

OPINION:

SCHWELB, *Senior Judge*: Following a jury trial, Lakeisha Wilson-Bey and Sckeena Marbury, who are sisters, were both convicted of first-degree premeditated murder while armed, in violation of *D.C. Code § § 22-2401, -3202* (1996). n1 The two women were also found guilty of several other offenses stemming from the same homicide. n2 The prosecution's theory at trial was that Ms. Wilson-Bey, who was twenty-one years old at the time that the offenses were committed, was the principal in the premeditated murder of Tomika Blackwell, and that Ms. Marbury, who was then eighteen, participated as an aider and abettor.

n1 This offense is now recodified in *D.C. Code § § 22-2101, -4502* (2001).

n2 These offenses were the following:

Conspiracy to Commit Murder and Assault	D.C. Code § 22-105 a (1996), recodified in § 22-1805 a (2001);
Assault with a Dangerous Weapon	D.C. Code § 22-502 (1996), recodified in § 22-402 (2001);

Aggravated Assault While Armed	D.C. Code § § 22-504.1, -3202 (1996), recodified in § § 22-404.01, -4502 (2001);
Malicious Destruction of Property	D.C. Code § 22-403 (1996), recodified in § 22-303 (2001);
Threats to Injure a Person	D.C. Code § 22-2307 (1996), recodified in § 22-1810 (2001);
Carrying a Dangerous Weapon	D.C. Code § 22-3204 (a)(1996), recodified in § 22-4504 (a) (2001).

Both women appealed from their convictions, contending principally that the trial judge instructed the jury erroneously with respect to the "intent" element of "aiding and abetting" first-degree premeditated murder. Specifically, appellants claim that the trial court committed reversible error, in the context of this case, by instructing the jury that "[a]n aider and abettor is legally responsible for the natural and probable consequences of the crime in which [s]he intentionally participates."

On April 7, 2005, a division of this court affirmed appellants' convictions. *Wilson-Bey v. United States, 871 A.2d 1155 (D.C. 2005)* (*Wilson-Bey I*). The division noted the existence of substantial authority casting doubt on the appropriateness of the "natural and probable consequences instruction," *id. at 1161-62, 1165-66*, but concluded that then-binding precedent in this jurisdiction required affirmance of the convictions. *Id. at 1163-64*. The members of the division expressed the view that consideration of the issue by the en banc court may be warranted. *Id. at 1166*.

Each appellant petitioned the full court to rehear the case, and on November 2, 2005, we granted both petitions and vacated the opinion of the division in *Wilson-Bey I*. *See Wilson-Bey v. United States, 886 A.2d 77 (D.C. 2005)* (per curiam) (en banc) (*Wilson-Bey II*). We now hold that the trial court's instruction regarding the requisite intent was erroneous, for in any prosecution for premeditated murder,

whether the defendant is charged as a principal or as an aider or abettor, the government must prove all of the elements of the offense, including premeditation, deliberation, and intent to kill. Because the instruction given in this case omitted the *mens rea* element of the offense charged, the error was of constitutional magnitude. Concluding that the erroneous instruction was prejudicial as to Ms. Marbury but harmless beyond a reasonable doubt as to Ms. Wilson-Bey, we reverse Ms. Marbury's conviction of premeditated murder while armed. With a single exception unrelated to the principal issue before us, we affirm Ms. Marbury's other convictions and all of Ms. Wilson-Bey's convictions. n3

> n3 The parties agree, and so do we, that the appellants' convictions for assault with a dangerous weapon merge into their convictions for aggravated assault while armed. Accordingly, both appellants' convictions for assault with a dangerous weapon must be vacated.

I.

THE TRIAL COURT PROCEEDINGS

A. *The evidence.*

The facts relevant to these appeals were described in *Wilson-Bey I, 871 A.2d at 1157-59*, and we summarize them briefly, borrowing liberally from the division's narrative. On the evening of January 16-17, 2000, several young women were playing cards in an apartment in southeast Washington, D.C. An argument broke out between the decedent, Tomika Blackwell, and appellant, Sekeena Marbury, who had been drinking heavily. After the two women, whose quarrel was causing a disturbance, left the apartment at the request of their hostess, the dispute escalated from words to blows, and

Ms. Blackwell easily bested Ms. Marbury in the fight that followed. At the conclusion of the encounter, Ms. Marbury was lying on the ground with a bloody nose, a knot on her head, a busted lip, and an injured eye. By all accounts, Ms. Marbury was both drunk and angry.

In the hours after her beating, Ms. Marbury related to several of her friends that she had been "jumped" by Tomika Blackwell and two of Tomika's alleged confederates. According to Teresa Brown, in whose car Ms. Marbury was riding away from the scene of the fight, a "ranting and raving" Ms. Marbury proclaimed that "I'm coming back. I'm going to kill that bitch." n4 Appellant Lakeisha Wilson-Bey, who had clashed with Ms. Blackwell on a previous occasion, n5 was notified of her younger sister's beef, and resorting to terminology identical to that allegedly used by Ms. Marbury, she stated in front of the group of young women that had gathered in the wake of the fight that she was going to "kill that bitch." n6 Eventually, the group of eight, including both appellants, armed themselves with knives and baseball bats and set out in a van for Ms. Blackwell's apartment. Their ostensible plan was to find out why Ms. Marbury had been beaten up and to avenge Ms. Marbury by fighting Ms. Blackwell and her friends. All of the women in the van were subsequently charged with first-degree premeditated murder while armed, but several of them agreed to cooperate with the government in exchange for negotiated plea agreements, and three testified at trial against the appellants. n7 The facts described below are based largely on their testimony and that of Ms. Blackwell's boyfriend, Arnold Rucker. The prosecution witnesses were all impeached, at least in some measure, but there was evidence which, if credited, would permit an impartial jury to find that both appellants set out deliberately to murder Ms. Blackwell in retaliation for her having beaten up Ms. Marbury, and that Ms. Wilson-Bey repeatedly stabbed the decedent, thus carrying out this premeditated plan. The sufficiency of the evidence cannot be persuasively disputed by either appellant.

n4 Ms. Brown was, however, impeached with convictions for theft and false pretenses, and with a statement to the police in which she failed to mention Ms. Marbury's threat to kill the decedent. *See also Wilson-Bey I, 871 A.2d at 1166 n.20* (trial judge did not err in limiting cross-examination of Ms. Brown regarding her failure to volunteer to the grand jury that Ms. Marbury threatened to kill the decedent).

n5 Ms. Blackwell's friend, Diamonika Thompson, was dating a man with whom Ms. Wilson-Bey had previously been involved. Both appellants apparently blamed the decedent for this development, which may have precipitated the fight between Ms. Blackwell and Ms. Marbury. There was also testimony, however, that Ms. Marbury described the situation as being her sister's problem, not her own.

n6 Ms. Wilson-Bey also allegedly used the expression "fuck [her] up" with respect to her plans for Ms. Blackwell.

n7 Ms. Wilson-Bey's attorney called two of the "cooperating witnesses" to testify on his client's behalf.

The van in which the eight young women travelled to seek out Ms. Blackwell was owned and driven by appellants' friend, Angel Lewis. When the vehicle arrived outside Ms. Blackwell's apartment house, the two appellants and their friend Lashawn Miller ran up to Ms. Blackwell's unit, Apartment 304. According to prosecution witnesses, Ms. Wilson-Bey had a large butcher knife or steak knife n8 in her hand, and Ms. Marbury was carrying both a bat and a knife. The other occupants of the van, several of them armed, followed the initial trio up the stairs.

n8 Arnold Rucker, Ms. Blackwell's boyfriend, described the knife as "the biggest size that come[s] in the set."

At the time the appellants arrived on the scene, Ms. Blackwell was inside the apartment with Mr. Rucker and another woman. Rucker became aware of the commotion outside, and he heard someone calling for Ms. Blackwell. Rucker opened the door, and he observed what he described as "a rack of females" in the hall. He testified that several of the women were carrying weapons. Rucker did not know Ms. Wilson-Bey, n9 but he recognized Ms. Marbury as the young woman whom Ms. Blackwell had fought and bested earlier that night. According to Rucker, Ms. Wilson-Bey was at the head of the group, holding a butcher knife, and she asked for Tomika. Ms. Blackwell walked to the door, stood behind Rucker, and announced: "I'm right here." Although she was not armed, Ms. Blackwell advanced on Ms. Wilson-Bey. Rucker tried unsuccessfully to restrain Ms. Blackwell, but while he was attempting to do so, Ms. Wilson-Bey swung the knife at Ms. Blackwell several times, inflicting a stab wound near her victim's right eye. Ms. Blackwell, bleeding profusely, nevertheless tried to fight her knife-wielding assailant. The two women struggled on the floor, with Ms. Blackwell on top, and during the ensuing melee, Ms. Wilson-Bey (and apparently one or more other assailants) n10 stabbed Ms. Blackwell several more times. One witness testified that Ms. Marbury struck Ms. Blackwell with a bat while Ms. Wilson-Bey was stabbing her; according to Rucker, however, Ms. Marbury was initially just standing there, crying. n11

n9 Rucker was subsequently unable to identify Ms. Wilson-Bey's photograph in a photo array, but he did identify her in court.

n10 Gravely injured, Ms. Blackwell said that "[t]hose bitches stabbed me" and that "I'm going to die this time." The decedent thus evidently believed that Ms. Wilson-Bey was not the only person who stabbed her. There was also expert testimony that Ms. Blackwell's death was caused by wounds inflicted by a knife smaller than the one that Ms. Wilson-Bey was carrying.

n11 Rucker stated, however, that at some point, Ms. Marbury began swinging her knife; there was also testimony that she threw a bat at Rucker. The evidence of the various witnesses regarding Ms. Marbury's actions at the scene of the homicide was contradictory and inconsistent.

At approximately 4:00 a.m. on January 17, officers from the Metropolitan Police Department arrived at the apartment. They found Ms. Blackwell unconscious, and she was suffering from multiple wounds to the face and body. The officers transported Ms. Blackwell to D.C. General Hospital. At 4:30 a.m., Tomika Blackwell was pronounced dead.

Ms. Blackwell was not the only person who suffered injury to person or property as a result of the criminal activities of the appellants and of the other members of their group. Arnold Rucker was stabbed in the arm, and although he left the hospital before being treated, n12 he later testified that he suffered intense pain for two weeks, and the wound left a large scar. Moreover, after the appellants and their friends left Ms. Blackwell bleeding to death in her apartment, they proceeded to the home of Teresa Brown, in whose car Ms. Marbury had earlier left the scene of the fight; they did so because Ms. Marbury had stated that Ms. Brown was one of the women who had joined Ms. Blackwell in attacking Ms. Marbury. Upon arrival at Teresa Brown's apartment house, the women tried to locate Ms. Brown's unit, and they

yelled at Ms. Brown to come out. Ms. Wilson-Bey allegedly threatened to kill Ms. Brown; Ms. Marbury allegedly made a similar threat to Ms. Brown's fiance. When Ms. Brown declined to leave her apartment, several of the women took turns stomping on Ms. Brown's automobile, and they shattered the car windows, inflicting over $700 worth of damage. There was also evidence that after the women had left Ms. Brown's car and apartment and completed the night's revenge-seeking activities, Ms. Wilson-Bey telephoned her brother and gave him the names of all the women who were present at the homicide, thereby implying a threat of reprisal in case any of them "snitched."

n12 Rucker was apparently wanted by the police.

A forensic pathologist called by counsel for Ms. Wilson-Bey testified that Ms. Blackwell died as a result of a stab wound in the neck. The witness opined that the fatal injury had been inflicted by a small knife with a narrow blade, and that it could not have been caused by a knife as large as the one Ms. Wilson-Bey was alleged to be carrying. n13 At the trial, Ms. Wilson-Bey's attorney contended that his client neither killed the decedent nor intended to kill her; he also argued that Ms. Wilson-Bey was acting in self-defense. Ms. Marbury's defense was essentially that she was hopelessly drunk and that she took no part in the armed assault on Ms. Blackwell. Neither appellant testified.

n13 There was also testimony that one of the appellants' friends subsequently discarded this knife at Ms. Wilson-Bey's direction.

B. *The aiding and abetting instruction.*

The issue that led this court to consider this case en banc initially arose at trial when the prosecutor -- not either defense attorney -- asked for a modification of the Redbook Instruction n14 on aiding and abetting. The prosecutor's stated goal was to ensure that the government would not be

required to prove, in order to secure a first-degree conviction, that Ms. Marbury premeditated the murder or specifically intended that the decedent be killed. Although the government had identified Ms. Wilson-Bey as the principal in the armed premeditated murder of Ms. Blackwell, n15 the prosecutor contended that, as an aider or abettor, Ms. Marbury was guilty of the same offense. The prosecutor argued that Ms. Marbury

> did not have to go with the specific intent to commit the ultimate crime, which in this case would be the killing. [A]ll [that] would be necessary was that she participate in some unlawful manner while present and that she have some desire to participate and to make whatever the unlawful purpose was to succeed in this case.

Subsequently, the prosecutor added:

> [O]ur concern is that the jurors would think that the crime in this case is the ultimate crime which was the murder, as opposed to the defendant being guilty if they [sic] participated in any unlawful way at the scene, whether there was the intent to kill, which was the crime, or merely participated in the assault.
>
> . . . I want the jury . . . to be clear that as long as they're there and participating [in] the assault, what's going on on that platform, then [all] the defendants can be found guilty [of premeditated murder while armed]. This all goes to foreseeability, natural and reasonable consequences of the acts. I just don't want them to hold the defendants to the commission of the murder.

n14 CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA (4th ed. 1993), Instruction 4.02.

n15 The government also asserted that if the proof was insufficient to prove that Ms. Wilson-Bey was guilty as the principal, she was nevertheless liable for premeditated murder as an aider and abettor.

In order to make it clear to the jury that Ms. Marbury could properly be convicted of armed premeditated murder without intending that Ms. Blackwell be killed, the prosecutor asked the trial judge to modify Instruction 4.02 (Aiding and Abetting) of the 1993 Redbook by making intentional participation in a "criminal venture" (and not merely in a specific crime) a sufficient basis for conviction of first-degree premeditated murder while armed. The judge expressed agreement with the prosecutor's approach, and over defense objection, n16 he modified Redbook Instruction No. 4.02 by adding the language italicized below:

> Any person who in some way intentionally participates in the commission of a crime *or a criminal venture*, aid[s] and abets the criminal offender. She, therefore, is as guilty of the crime as she would be if she had personally committed each of the acts that make up the crime.
>
> To find that the defendant aided and abetted in committing a crime, you must find that the defendant knowingly associated herself with the person who committed the crime *or criminal venture*, that she participated in the crime *or criminal venture* as something she wished to

> bring about, and that she intended by her actions to make it succeed.

(Emphasis added.) n17

n16 Ms. Marbury's counsel took the lead in making and arguing this objection. Ms. Wilson-Bey's attorney stated that he was joining counsel for Ms. Marbury in his objection to the aiding and abetting instruction.

n17 The judge defined the criminal venture as follows:

> Now, when I refer to criminal venture, the criminal venture in this case was to assault and murder Tomika Blackwell and to assault Teresa Brown and Diamonika Thompson.

The reader will recall that Teresa Brown was the woman who drove Ms. Marbury from the scene of the fight and whose car was later damaged. Diamonika Thompson was the woman who was dating Ms. Wilson-Bey's former boyfriend; she was also a passenger in Ms. Brown's car. Ms. Brown testified for the government, but the prosecution did not call Ms. Thompson as a witness; she testified instead, as a defense witness, on behalf of Ms. Wilson-Bey.

In defining "criminal venture," the judge referred to "assault" and "murder," both of which are crimes. Thus, the charge as given, notwithstanding the added phrase, did not contemplate that the defendants could be convicted of armed premeditated murder on a theory that the decedent's death was a natural and probable consequence of non-criminal conduct.

Quoting two bracketed sentences from the Redbook instruction, the judge also charged the jury:

> It is not necessary that the defendant have had the same intent that the principal offender had when the crime was committed or *that she have intended to commit the particular crime by the principal offender*. An aider and abett[o]r is legally responsible for the acts of other persons *that are the natural and probable consequences of the crime or criminal venture in which she intentionally participates.*

(Emphasis added.) In light of the foregoing italicized language, the court's instruction did not require the prosecution to prove that Ms. Marbury acted upon a premeditated design to kill Ms. Blackwell, that she specifically intended Ms. Blackwell's death, or even that Ms. Marbury knew that her sister (or anyone else) intended to kill the decedent. *Cf. Hackney v. United States, 389 A.2d 1336, 1341 (D.C. 1978), cert. denied, 439 U.S. 1132, 59 L. Ed. 2d 95 (1979)* (quoting ROLLIN M. PERKINS, CRIMINAL LAW 662 (2d ed. 1969)). On the contrary, the jury was explicitly instructed that Ms. Marbury need *not* be shown to have intended to commit premeditated murder while armed, even though premeditation and deliberation are elements of that offense. *See Mills v. United States, 599 A.2d 775, 781 (D.C. 1991).*

Ms. Marbury's attorney, as we have noted, objected to the insertion into Redbook Instruction No. 4.02 of the "criminal venture" language. He complained that

> [i]f you put criminal venture, it negates the same intent as the principal and it makes - just makes her responsible for anything that happens there. I mean regardless whether or not she had specific intent or whether or not she was just there. I mean - and that wording it says, look, if you're [there], regardless what happens, you're responsible for it if you use criminal venture.

Although neither defense attorney requested the judge not to give the "natural and probable consequences" instruction, Ms. Marbury's attorney did implicitly argue, in the passage quoted above, that his client, as an aider and abettor, must be shown to have "the same intent as the principal," *i.e.*, the premeditated intent to kill, in order to be guilty of premeditated murder.

Both appellants were found guilty, *inter alia*, of first-degree premeditated murder while armed. Each was sentenced to serve an aggregate term of thirty-six years to life.

II.

THE STANDARD OF REVIEW

In the order granting appellants' petitions for rehearing en banc, the court explicitly directed the parties to address the applicable standard of review. *Wilson-Bey II*, *886 A.2d at 78*. In this case, the issue as to the proper standard arises in a somewhat unusual posture, because

> 1. although, in the trial court, appellants objected to a modification of the applicable Redbook instruction on grounds that, if valid, could not be reconciled with the bracketed "natural and probable consequences" language in

the instruction itself, neither appellant explicitly objected to that bracketed portion of the instruction; both appellants, however, now challenge that portion on appeal; but

2. in its initial brief to the division, the government did not claim that appellants had failed to preserve the issue raised on appeal, thus arguably waiving the point and implicating the "waiver of the waiver" principle. n18 Moreover, in its brief to the en banc court, the government only perfunctorily addressed the question whether appellants' claim of instructional error was preserved and whether this court's review should be for plain error. n19

n18 *See Wilson-Bey I, 871 A.2d at 1156 n.4*, and authorities there cited.

n19 In that brief, the government confined its assertion that the plain error standard applies to the first six lines of its twenty-second footnote. Although the government did frame its first question presented as whether the trial court committed plain error in instructing the jury, it has not argued anywhere in its submission that if there was error, that error was not plain. In our view, the government has come perilously close to abandoning the point that appellants' objection was not preserved. *Cf. Bardoff v. United States, 628 A.2d 86, 90 n.8 (D.C. 1993).*

The question whether the challenged instruction was proper - *i.e.*, what elements the prosecution must prove to show aiding and abetting of premeditated murder - is one of law. *Little v. United States, 709 A.2d 708, 711 (D.C. 1998)*;] *accord, Brown v. United States, 881 A.2d 586, 593 (D.C.*

2005). Accordingly, our review is *de novo*, and we accord no deference to the ruling of the trial court.

Rule 30 of the Superior Court's Rules of Criminal Procedure provides in pertinent part:

> No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury. n20

Because appellants did not specifically state to the trial court that aside from the references to "criminal venture," the portions of Redbook Instruction No. 4.02 now challenged on appeal should not be given, they arguably failed to state "distinctly" the matter to which they objected. n21 We conclude, however, that in objecting to the "criminal venture" language proposed by the prosecutor as a modification of the Redbook instruction, appellants urged a theory which, if it had been adopted by the trial judge, would have rendered illogical and self-contradictory the portions of the instruction now complained of on appeal. Given the judge's ruling on the objection to "criminal venture" and his explanation of that ruling, any further argument by defense counsel regarding the "natural and probable consequences" instruction, and any further contention that the aider or abettor must be shown to have the specific intent to kill the decedent, "would have fallen on deaf judicial ears. . . ." *Reams v. United States, 895 A.2d 914, 921 (D.C. 2006)*.

n20

> While Rule 30 could be read literally to bar any review of an appellant's claim of instructional error absent an appropriate objection, the Supreme Court, in interpreting the identical federal rule, held that an appellate court may conduct a limited review of such claims for plain error.
>
> *Gordon v. United States, 783 A.2d 575, 581-82 (D.C. 2001) (citing and following Jones v. United States, 527 U.S. 373, 378, 144 L. Ed. 2d 370 (1999)).*
>
> n21 We note that the judge gave the now-contested bracketed portion of the Redbook Instruction, see pp. 10-11, *supra*, without any prior discussion of it, so that the defense attorney did not focus on it. The position that appellants had taken with respect to the "criminal venture" language, however, necessarily suggests that they could not have been satisfied at trial with the portion of the instruction that they have challenged on appeal.

It is undisputed, as we have seen, that appellants objected to the instruction that exposed each defendant to accomplice liability if she "knowingly took part in the criminal venture." The grounds for counsel's objection were that the proposed instruction permitted an accomplice to be convicted of premeditated murder without the showing, required when the defendant is charged as a principal, that she had the specific intent to kill the decedent and that she had premeditated and deliberated. Nevertheless, the government contends, though not very forcefully, that appellants did not preserve an objection to the language making an aider and abettor "legally responsible for the acts of other persons that are the natural and probable consequences of the . . . criminal venture in which she intentionally participates." Our reading of the entire record leads us to disagree.

In requesting the redefinition of "crime" to include "criminal venture," the prosecutor expressly linked that modification to the now-challenged instruction, telling the judge that the defendants could be "guilty if they participated in any unlawful way at the scene [of the homicide], whether [or not] there was the intent to kill, . . . [and that this] goes to foreseeability, natural and reasonable consequences of the acts." More tellingly, the judge himself demonstrated his awareness of that link when he rejected appellants' objection to the phrase "criminal venture." The judge stated that he did not understand why, "as a matter of law," the prosecutor's reasoning was "inaccurate," for "[i]f the . . . defendant aided and abetted another in committing an assault with a knife or [with a bat,] . . . that person is . . . legally responsible for the acts of other persons that are the natural and probable consequence of those acts in th[e] criminal venture [in] which [she] intentionally participates." The judge thus indisputably endorsed the principle that (to use his own words) it is "not necessary that the defendant have the same intent that the principal offender had when the crime was committed." The judge also recognized that this principle derives in turn from the accomplice's "legal[] responsib[ility]" for the natural and probable consequences of her actions, a proposition with which the judge likewise explicitly agreed. In these circumstances, we believe that the judge was "on notice that . . . [appellants'] position on the correct rule of law differed from the court's." *Russell v. United States*, *698 A.2d 1007, 1012 (D.C. 1997)*. Accordingly, the purpose of the contemporaneous objection rule was satisfied. *See, e.g., Watts v. United States*, *362 A.2d 706, 708 (D.C. 1976)* (en banc). Because appellants' argument was sufficient to "direct the judge's attention to the correct rule of law," *Hasty v. United States*, *669 A.2d 127, 134-35 (D.C. 1995)*, their failure to define the reach of their objection with "consummate clarity" is not dispositive. *Whitaker v. United States*, *617 A.2d 499, 508 (D.C. 1992)*; *see also Russell*, *698 A.2d at 1012* ("where there was

considerable discussion on the issue between counsel and the court throughout the trial, we think that counsel's failure to submit written requested instructions or to state his objections with exact precision does not compel plain error review"). Although appellants could have stated more explicitly and clearly that they objected to the bracketed portion of the Redbook instruction as written, and not merely to the modification of the instruction by the addition of the words "criminal venture," we conclude, all things considered, that their objections passed muster. n22

n22 Significantly, as we have noted, the government did not claim at all in its brief to the division that appellants had failed to preserve the objection to the natural and probable consequences instruction. This omission suggests that, at least initially, the government may have regarded Ms. Marbury's objection (joined by Ms. Wilson-Bey) that substitution of "criminal venture" for "crime" would make the defendants "responsible for anything that happened there" (regardless of their specific intent) as embracing an objection to responsibility for premeditated murder based on the natural and probable consequences standard. It was only after the division, *sua sponte*, raised the issue whether appellants' claims on appeal had been preserved, and after the division requested supplemental briefing on the point, that the government first argued that the claim made on appeal had not been preserved and that the correct standard of review was therefore for plain error.

This new turn in the government's position prompted appellants to argue that the government had forfeited its right to challenge, on appeal, the sufficiency of appellants' objection at trial to the "natural and probable consequences" instruction. *See, e.g., In re T.L.*, 859 A.2d 1087, 1090 n.6 (D.C. 2004)

(explaining "waiver of the waiver" principle); *United States v. Leichtnam, 948 F.2d 370, 375 (7th Cir. 1991)* ("whatever its reasoning, the government has now waived waiver as a defense"). The government contended, on the other hand, that its initial failure to argue for a plain error standard did not waive appellants' alleged failure to preserve their objection to the instruction, especially after the court had given the appellants the opportunity to respond to the government's belated claim that the plain error standard applied. We need not resolve this dispute, for which there is something to be said for each side. It is enough to remark that the government's initial failure to challenge the sufficiency of appellants' objection, as well as its treatment of the issue as marginal in its brief to the en banc court, reinforce our conclusion that, albeit imperfectly, the challenge to the natural and probable consequences instruction has been adequately preserved.

III.

THE REQUIRED PROOF OF INTENT

A. *Background.*

Before the en banc court, as before the division, Ms. Marbury's basic position, joined by Ms. Wilson-Bey, n23 is that in first-degree premeditated murder cases, the Redbook instruction on aiding and abetting is inadequate and that it understates the requisite intent. She first argued that "[i]f the charge is first[-]degree murder based upon an alleged deliberate and premeditated killing, the abettor is not guilty of this degree of the crime unless he [or she] *either acted upon a premeditated design to cause the death of the deceased or knew that the perpetrator was acting with such an intent. . . .*" *Hackney, 389 A.2d at 1341* (emphasis added)

(quoting at 662). However, Ms. Marbury also quoted another leading commentary, as follows:

> To determine the kind of homicide of which the accomplice is guilty, it is necessary to look to his state of mind; it may have been different from the state of mind of the principal and they thus may be guilty of different offenses. *Thus, because first- degree murder requires a deliberate and premeditated killing, an accomplice is not guilty of this degree of murder unless he acted with premeditation and deliberation.*

WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 13.2 (c), at 347 (2d ed. 2003) (emphasis added). Although Ms. Marbury's attorneys initially appeared to have been satisfied with the PERKINS approach, which requires intentional participation by the accomplice in the crime with knowledge of the principal's design to kill (even without proof of a specific intent to kill on the accomplice's part), they now argue, with the support of the Public Defender Service as *amicus curiae*, for the more demanding LAFAVE standard.

> n23 Although, according to the prosecution, Ms. Wilson-Bey was the principal in the premeditated murder of Ms. Blackwell, and not merely an accomplice, the contested aiding and abetting instruction potentially affected Ms. Wilson-Bey as well. In light of the expert testimony to the effect that the fatal wound could not have been inflicted by a knife as large as the one allegedly carried by Ms. Wilson-Bey, this appellant could theoretically have been an aider and abettor to another person whose

> stabbing of the decedent with a different weapon actually killed her.

Ms. Marbury also complains of the use in premeditated murder cases of the bracketed "natural and probable consequences" language contained in Redbook Instruction No. 4.02, which was included in the trial judge's charge to the jury in this case. Ms. Marbury again quotes Professor LaFave:

> [G]eneral application of the "natural and probable consequence" rule of accomplice liability is unwarranted. *A*'s guilt as an accomplice to one crime should not per se be a basis for holding *A* accountable for a related crime merely because the latter offense was carried out by *A*'s principal, for this as well would result in *A*'s guilt of a crime as to which he did not have the requisite mental state.

Id., § 13.3 (b), at 362-63. n24 Appellants and the Public Defender Service have cited extensive authority consistent with Professor LaFave's approach.

> n24 Professor LaFave would confine the "natural and probable consequences" principle to "unique situations in which unusual principles of liability obtain." He cites as examples felony-murder and misdemeanor-manslaughter, which "permit conviction for a homicide or dangerous misdemeanor without any showing that the defendant intentionally, knowlingly, recklessly, or even negligently caused the death." In such limited circumstances, according to Professor LaFave, the doctrine "is not objectionable -- or, at least, no more objectionable than other applications of

the felony-murder and misdemeanor-manslaughter rules." *Id.* at 363.

The government responds that this court's precedents have "consistently and thoughtfully" applied the "natural and probable consequences" rule, and it argues that the Redbook instruction is defensible by analogy to the rule rendering conspirators liable for substantive offenses committed by their co-conspirators in furtherance of the conspiracy. *See Pinkerton v. United States, 328 U.S. 640, 646-47, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946); Thomas v. United States, 748 A.2d 931, 934 (D.C. 2000).* We hold that conviction of first-degree premeditated murder on an aiding and abetting theory requires the prosecution to prove that the accomplice acted with premeditation and deliberation and intent to kill, and we decline to draw the government's proposed analogy to *Pinkerton.* n25

N25 Our conclusion that the challenged instruction erroneously relieved the government of proving the *mens rea* element of the offense charged rests substantially on the application of principles embodied in this jurisdiction's aiding and abetting statute. We express no opinion on the validity -- or constitutionality -- of a similar instruction derived from a statute that, unlike the District's, defined accomplice liability partly in terms of the natural and foreseeable consequences of the abettor's actions.

B. *The aiding-and-abetting statute and the Peoni rule.*

In assessing appellants' contentions, we begin with D.C. Code § 22-105 (1996), now recodified in *D.C. Code § 22-1805* (2001), which reads as follows:

In prosecutions for any criminal offense all persons advising, inciting, or conniving at the

> offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.

The District's statute was enacted by Congress in 1901, eight years before its federal analogue. n26 We have stated that "[o]ur aiding and abetting statute does not differ substantially from its federal counterpart," *Hackney, 389 A.2d at 1342*, and we can look to the federal courts' interpretation of the federal statute in construing our own.

> n26 The original federal aiding and abetting federal statute, initially codified in *18 U.S.C. § 550*, provided that "[w]hoever directly commits an act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal." The current federal statute, *18 U.S.C. § 2*, states that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

In *United States v. Peoni, 100 F.2d 401 (2d Cir. 1938)*, Judge Learned Hand, writing for the court, addressed the meaning of the words "aids" and "abets" in the federal statute. Judge Hand surveyed definitions of aiding and abetting throughout centuries of common law, and he concluded as follows:

> [A]ll these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; . . . [T]hey all demand *that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.* All the words used - even the most colorless, "abet" -- carry an implication of purposive attitude towards it.

Id. at 402 (emphasis added). The court held in *Peoni* that the defendant, who had sold counterfeit bills to a purchaser who had then resold the counterfeit money to a third person, could not be held criminally responsible for the subsequent transaction, even if it was a "natural consequence of [his] original act." *Id.* In our view, the portions of Redbook Instruction No. 4.02 which appellants have challenged in this case do not require proof that the accomplice harbored the "purposive" intent described by Judge Hand, and are therefore irreconcilable, in the context of this first-degree premeditated murder case, with the well-established *Peoni* standard.

Although *Peoni* was decided sixty-eight years ago, it remains the prevailing authority defining accomplice liability. In 1949 the Supreme Court explicitly adopted *Peoni's* purpose-based formulation. *Nye & Nissen v. United States, 336 U.S. 613, 618, 69 S. Ct. 766, 93 L. Ed. 919 (1949).* This court has likewise followed *Peoni, see, e.g.,* [*Reginald B.*] *Brooks v. United States, 599 A.2d 1094, 1099 (D.C. 1991); Hackney, 389 A.2d at 1342,* and we have held that an accomplice "must be concerned in the commission of *the specific crime with which the principal defendant is charged*[;] he must be an associate in guilt of *that crime.*" *Roy v. United States, 652 A.2d 1098, 1104 (D.C. 1995)* (emphasis in original).

Every United States Circuit Court of Appeals has adopted *Peoni's* requirement that the accomplice be shown to have intended that the principal succeed in committing the charged offense, and the federal appellate courts have thus rejected, explicitly or implicitly, a standard that would permit the conviction of an accomplice without the requisite showing of intent. n27 The majority of state courts have also adopted a purpose-based standard. n28 *See also* LAFAVE § 13.2 (d), at 349 & n.97. Federal n29 and state n30 model jury instructions are also generally consistent with *Peoni*, and require proof that the accomplice intended to help the principal to commit the charged offense.

n27 *See, e.g., Wilson v. United States, 333 U.S. App. D.C. 103, 109, 160 F.3d 732, 738 (1998)* ("Although the intent of the aider and abettor need not be identical to that of the principal, the government still was required to show that Judd had sufficient knowledge and participation to allow a reasonable juror to infer that he 'knowingly and willfully participated in the offense in a manner that indicated he intended to make it succeed. In other words, the government must show that Judd intended to bring about [the decedent's] murder . . . ."); *United States v. Ruiz, 105 F.3d 1492, 1499 (1st Cir. 1997)* (to prove aiding and abetting, the evidence must show that the crime was "something [the accomplice] wished to bring about and sought by his actions to make it succeed). *United States v. Nelson, 277 F.3d 164, 213 (2d Cir. 2002)* (accomplice must be shown to have "necessary intent" that would lead to criminal liability if the principal's act had been "directly performed by him"); *Nicholas v. Saul Stone & Co., 224 F.3d 179, 189 (3d Cir. 2000)* (accessory must be shown to have both "knowledge of the principal's intended" act and "the intent to promote that principal's violation");

United States v. Burgos, 94 F.3d 849, 873 (4th Cir. 1996) (en banc) (accomplice must be proved to have "knowledge of the result and intent to bring about that result"); *United States v. Delgado, 256 F.3d 264, 274 (5th Cir. 2001)* ("To aid and abet, a defendant must share in the intent to commit the offense as well as play an active role in its commission."); *United States v. Searan, 259 F.3d 434, 444 (6th Cir. 2001)* ("In order to prove association there must be evidence that the defendant shared the criminal intent of the principal"; the accomplice must be shown to have "the intent to aid in [the crime's] commission"); *United States v. Heath, 188 F.3d 916, 921 (7th Cir. 1999)* (To prove that the defendant associated himself with the crime, the prosecutor "must show that the defendant shared the principal's criminal intent"); *United States v. Greer, 467 F.2d 1064, 1068-69 (7th Cir. 1972)* (relying on *Peoni* and Model Penal Code in rejecting foreseeability standard for accomplice liability as one of "negligence rather than criminal intent"); *United States v. Roan Eagle, 867 F.2d 436, 445 (8th Cir. 1989)* ("Aiding and abetting is not a separate crime but rather is linked to the underlying offense and shares the requisite intent of that offense."); *United States v. Ramos-Rascon, 8 F.3d 704, 711 (9th Cir. 1993)* (participation in an unlawful venture not enough; accomplice must be shown to have "intentionally assisted in the venture's illegal purpose"); *Johnson v. Gibson, 254 F.3d 1155, 1163 (10th Cir. 2001)* (jury must be told that accomplice is not guilty of "first degree malice murder" unless he had "the specific intent to kill"); *United States v. Leonard, 138 F.3d 906, 909 (11th Cir. 1998)* (aider and abettor must have "shared the criminal intent of the principal(s)"). Not all of these cases involved premeditated murder prosecutions, but each of these decisions in some measure supports the result that we reach in this case.

n28 In suggesting that en banc consideration of the instructional issue may be appropriate, the division cited five state court decisions holding, in the context of a premeditated murder prosecution, that the government must prove that the accomplice had the specific intent to kill the victim. *Wilson-Bey I, 871 A.2d at 1165-66* (discussing *Savage v. State, 18 Fla. 909, 962-63 (1882)*; *Leavine v. State, 109 Fla. 447, 147 So. 897, 904 (Fla. 1933)*; *Commonwealth v. Bachert, 499 Pa. 398, 453 A.2d 931, 935 (Pa. 1982)*; *State v. Clemons, 946 S.W.2d 206, 230 (Mo. 1997)*; and *Tharp v. Commonwealth, 40 S.W.3d 356, 365 (Ky. 2000)*). In its *amicus* brief, the Public Defender Service has brought to our attention numerous additional decisions to the same general effect, including, *inter alia*, *Jordan v. State, 81 Ala. 20, 1 So. 577, 586 (Ala. 1887)* ("When a particular intent or formed design is requisite to constitute an offense, knowledge of its existence, and a common purpose to perpetrate the offense must be shown before a person can be convicted of aiding and abetting"); *State v. Phillips, 202 Ariz. 427, 46 P.3d 1048, 1056-58 (Ariz. 2002)* (reversing premeditated murder conviction because state should have been required to show that accomplice had the specific intent to kill, and rejecting the theory that the conviction could stand if the accomplice "reasonably should have foreseen" the murder); *State v. Robertson, 254 Conn. 739, 760 A.2d 82, 110 (Conn. 2000)* (prosecution must prove that accomplice "share[d] the criminal intent and community of unlawful purpose with the perpetrator," and "intent is a necessary element of the crime of murder whether the defendant is the principal or merely an accessory"); *State v. Fabeny, 132 Idaho 917, 980 P.2d 581, 588 (Idaho Ct. App. 1999)* (because "[a]iding and abetting requires some proof that the accused either participated in or assisted, encouraged, solicited, or counseled the commission of the crime," the "state had to show that [the defendant] had the requisite intent to kill . . . and acted in furtherance of that intent by encouraging [the principal]"); *State v. Ferguson, 20 S.W.3d 485, 497 (Mo. 2000)* (en banc) ("[W]here a defendant

is convicted of first degree murder as an accomplice, the state must prove that the defendant personally deliberated upon the murder."); *State v. Lantis, 1998 MT 172, 289 Mont. 480, 962 P.2d 1169, 1175 (Mont. 1998)* (to be guilty as an aider and abettor of "deliberate homicide," one must have "had the purpose to promote or facilitate commission of deliberate homicide"); *Sharma v. State, 118 Nev. 648, 56 P.3d 868, 872-73 (Nev. 2002)* (accomplice must have specific intent to kill to be guilty of attempted murder; court "disavow[ed] and abandon[ed]" a rule based on "natural and probable consequences"); *People v. Weiss, 290 N.Y. 160, 48 N.E.2d 306, 312 (N.Y. 1943)* (reversing accomplice's first-degree murder conviction because trial judge gave "normal and necessary consequences" instruction which "withdrew from the jury the necessity of finding an intent to kill"); *State v. Goode, 350 N.C. 247, 512 S.E.2d 414, 422 (N.C. 1999)* (aider and abettor must "communicate" to the principal "his intention to assist in [the crime's] commission: "[w]here a defendant aids and abets the perpetrator in the commission of a first-degree murder based on premeditation and deliberation, he shares the criminal intent of the perpetrator and thus possesses the requisite *mens rea* and specific intent for that crime"); *Johnson v. State, 1996 OK CR 36, 928 P.2d 309, 315 (Okla. Crim. App. 1996)* ("[I]n a malice murder case the State must prove the aider and abettor personally intended the death of the victim and aided and abetted with full knowledge of the intent of the perpetrator."); *State v. Diaz, 654 A.2d 1195, 1202 (R.I. 1995)* (accomplice must share in principal's intent to commit charged offense; in murder case, government had to show deliberation and premeditation).

> A few courts have applied a somewhat less stringent standard than that envisaged in *Peoni* and advocated in LAFAVE, but have required proof that the accomplice aided the principal *either* with specific intent to bring about the crime *or* with knowledge of the principal's specific intent. *See, e.g., State v. Raines,*

326 Md. 582, 606 A.2d 265, 271 (Md. 1992) ("[W]hen a specific intent is a necessary element of a particular crime one cannot be a principal in the second degree [*i.e.*, an aider-and-abettor] to that offense unless such person entertained such an intent or knew that the principal in the first degree entertained such intent"); *State v. Arnold, 253 Neb. 789, 572 N.W.2d 74, 79 (Neb. 1998)* ("When a crime requires the existence of a particular intent, an alleged aider or abettor can be held criminally liable . . . if . . . the aider and abettor knew that the perpetrator of the act possessed the required intent or that the aider and abettor himself or herself possessed such intent."). These decisions are generally consistent with the approach in PERKINS, quoted by this court in *Hackney, 389 A.2d at 1341*. In most but not all instances, the PERKINS standard will lead to the same result as the LAFAVE approach, because it is a reasonable inference that one who intentionally assists the principal, with knowledge of the principal's intent, shares that intent. In a few situations, however, the results of the two approaches may diverge, *e.g.*, where, as in this case, it is claimed that the alleged accomplice, Ms. Marbury, was too intoxicated to premeditate or deliberate, or to have the specific intent to kill the decedent, even if she knew that Ms. Wilson-Bey intended to do just that.

A minority of jurisdictions follow the "natural and probable consequences" approach. *See, e.g., People v. Beeman, 35 Cal. 3d 547, 674 P.2d 1318, 1326, 199 Cal. Rptr. 60 (Cal. 1984)* ("the liability of an aider and abettor extends also to the natural and reasonable consequences of the acts he knowingly and intentionally aids and encourages"); *State v. Linscott, 520 A.2d 1067, 1070 (Me. 1987)* (under a Maine statute, "[s]o long as the accomplice intended to promote the primary crime, and the commission of the secondary crime was a foreseeable consequence of the

accomplice's participation in the primary crime, no further evidence of the accomplice's subjective state of mind as to the secondary crime is required"); *see also People v. Robinson, 475 Mich. 1, 715 N.W.2d 44, (Mich. 2006)*. The cases are not always easy to categorize, for some of the decisions are based on state statutes, but to the extent that any of the decisions relied on by the government cannot be reconciled with the *Peoni* standard and the LAFAVE approach, we decline to follow them.

n29 *See, e.g.*, KEVIN F. O'MALLEY *ET AL.*, FED. JURY PRACT. & INSTR. 18.01 (5th ed. 2000) (accomplice must act with the "intent to commit the crime").

n30 *See, e.g.*, ARIZ. CRIM. JURY INSTR. 3.01 (Accomplice) (accomplice's "liability extends only to offenses that the defendant intended to aid, solicit, facilitate or command"); MASS. CRIM. JURY INSTR. 2-10 (2005) (accomplice must "have shared the state of mind of the principal"; instruction also quotes *Peoni*); MD. STATE BAR ASS'N CRIM. PATTERN JURY INSTR. 6:01 (2003) (Aiding and Abetting) (accomplice must act "with the intent to help commit the crime" and must have "willfully participated with the intent to make the crime succeed"); N.J. STANDARD CRIM. JURY INSTR. 72C:2-6 (Accomplice must have "possessed the criminal state of mind that is required to be proved against the person who actually committed the criminal act").

Although, as we have noted, the courts in a minority of jurisdictions have applied a "natural and probable consequences" approach to accomplice liability, it is significant that some of these courts have recently shifted to a standard consistent with *Peoni*. In *Sharma, supra* note 28, for example, the Supreme Court of Nevada reversed the conviction of an alleged aider and abettor for attempted murder (which required a showing of specific intent to kill) because the jury received a "natural and probable consequences" instruction but was not told that the accomplice "must have aided and abetted the attempt *with the specific intent to kill*." *56 P.3d at 873* (emphasis added). The court noted that the natural and probable consequences doctrine

> has been harshly criticized by most commentators as both incongruous and unjust because it imposes accomplice liability solely upon proof of foreseeability or negligence when typically a higher degree of *mens rea* is required of the principal. It permits criminal liability to be predicated upon negligence even when the crime involved requires a different state of mind. Having reevaluated the wisdom of this doctrine, we have concluded that its general application in Nevada to specific intent crimes is unsound precisely for that reason: it permits conviction without proof that the accused possessed the state of mind required by the statutory definition of the crime.

Id. at 871-72 (citations, internal quotation marks, and alterations omitted). Thus, "in order for a person to be held

accountable for the specific intent of another under an aiding and abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime." *Id. at 872* The court relied on the decision of the Supreme Court of New Mexico in *State v. Carrasco, 1997 NMSC 47, 124 N.M. 64, 946 P.2d 1075 (N.M. 1997)*, in which the court likewise disavowed the "natural and probable consequences" doctrine and held that "an accessory must share the criminal intent of the principal." *Id. at 1079.*

With the exception of the "natural and probable consequences" language, our own aiding and abetting instruction was likewise largely derived from the language in *Peoni*, and we have repeatedly cited that language as the standard for accomplice liability. *See, e.g., Trapps v. United States, 887 A.2d 484, 489 (D.C. 2005)*; *Outlaw v. United States, 604 A.2d 873, 875 (D.C. 1992)*; [*Reginald B.*] *Brooks, 599 A.2d at 1099*; *Hackney, 389 A.2d at 1342.* Indeed, the trial judge's instruction in this case, quoted at pp. 10-11, *supra*, contained the critical language from *Peoni*. However, the "natural and probable consequences" standard has also been invoked in this jurisdiction, even in cases, such as prosecutions for premeditated murder, in which it runs afoul not only of *Peoni*, but also of the requirement that the defendant be shown to have a deliberate and premeditated intent to kill. *See Wilson-Bey I, 871 A.2d at 1163-64.*

C. *The natural and probable consequences standard and the Peoni rule.*

In *United States v. Heinlein, 160 U.S. App. D.C. 157, 490 F.2d 725 (1973)*, a felony murder case, the court stated that "the accomplice who aids and abets the commission of a felony is legally responsible as a principal for all acts . . . which are in furtherance of the common design . . . or are the natural and probable consequence of acts done in the perpetration of the felony." *160 U.S. App. D.C. at 167, 490*

F.2d at 735. See also Waller v. United States, 389 A.2d 801, 807 (D.C. 1978) (quoting *Heinlein*, in a felony murder case, for the proposition that an accomplice is responsible for the foreseeable consequences of the underlying felony); *Harris v. United States, 377 A.2d 34, 37 (D.C. 1977)* (also quoting *Heinlein*). It is true, in a felony murder case, that an accomplice does not escape liability for a foreseeable death merely because he or she neither intended to kill nor pulled the trigger. To hold otherwise would be to reject the underlying purpose of the felony murder doctrine, which is designed to deter the commission of certain especially dangerous felonies because these particular crimes create an unacceptably high risk of death, and which permits the conviction of the defendant, whether she is a principal or accomplice, without any showing that she intentionally or knowingly caused the decedent's death. See discussion, *infra*, at pp. 33-34.

Nevertheless, as the division explained in *Wilson-Bey I*, the standard articulated in *Heinlein* has also been invoked in premeditated murder cases. *See, e.g., Daniels v. United States, 738 A.2d 240, 246 (D.C. 1999); Matthews v. United States, 629 A.2d 1185, 1197 (D.C. 1993); Byrd v. United States, 364 A.2d 1215, 1219 (D.C. 1976).* n31 In the 1993 edition of the Redbook, the "natural and probable consequences" principle was included in brackets in Instruction No. 4.02, dealing generally with accomplice liability. In our view, however, the application of the bracketed language in Instruction No. 4.02 to a first-degree premeditated murder prosecution renders the instruction internally inconsistent. This is so because the language from *Peoni* that appears in the instruction requires the prosecution to prove that the accomplice knowingly associated herself with the commission of the crime, that she participated in the crime as something she wished to bring about, and that she intended by her actions to make it succeed, while the natural and probable consequences theory dispenses with any requirement that the accomplice be shown to have the

requisite mental state for conviction of first-degree murder, including premeditation and specific intent to kill.

n31 The division affirmed appellants' convictions in this case on the basis of the then-binding authority of *Daniels* and *Byrd. Wilson-Bey I, 871 A.2d at 1163-65.* For an earlier case in which the court arguably invoked the "natural and probable consequences" standard in a first-degree murder prosecution and held that specific intent to kill need not be shown, *see Eagles v. United States, 58 App. D.C. 122, 125, 25 F.2d 546, 549 (1928); cf. Patten v. United States, 42 App. D.C. 239 (1914)* (court utilized "natural and probable consequences" standard in first-degree murder case arising out of a conspiracy).

In *Oates v. State, 97 Md. App. 180, 627 A.2d 555 (Md. Ct. Spec. App. 1993)*, Judge Charles E. Moylan, Jr., in an especially persuasive opinion, explained why the liability of each participant in criminal homicide committed by several persons must necessarily depend on his or her individual *mens rea*. Remarking on the "complex matrix of blameworthiness arising out of a single criminal homicide," the judge explained:

> When two or more persons are joint participants in a crime, they are joint participants only with respect to a single and common *actus reus*. Where, however, a single criminal act has different levels of blameworthiness contingent upon the particular *mens rea* with which it is perpetrated, multiple participants in that crime do not necessarily share the same *mens rea*. Although joint participation ultimately depends upon a mutual tie to the same criminal act, the

individual *mentes reae* or levels of guilt of the joint participants are permitted to float free and are not tied to each other in any way. If their *mentes reae* are different, their independent levels of guilt, reflected by nondependent verdicts, will necessarily be different as well.

* * *

The *mens rea* or level of blameworthiness of a principal in the first degree by no means controls the *mens rea* or level of blameworthiness of a principal in the second degree or of an accessory before the fact. If three codefendants burst into a motel room and discover the wife of one of them in an act of adultery, what is the crime if the two adulterers are then shot and killed? If the triggerman (the principal in the first degree) is the cuckolded husband, the Rule of Provocation may mitigate his guilt downward to the manslaughter level. The accomplice who hands him the gun, however, will be guilty at least of murder in the second degree, notwithstanding the fact that he is aiding and abetting a mere manslayer. If the third codefendant, who led the suspicious husband to the motel room in the first place, knew full well what would there be found and had been scheming for some time thereby to get rid of the adulterous lover, his premeditated intent to kill would raise his guilt to the first degree notwithstanding the guilt of his fellow participants at lower levels. Conversely, the principal in the first degree (the triggerman) could have possessed a premeditated intent to kill and his aider and abettor, who handed him the gun in a fit of jealous rage, might be the beneficiary of the Rule of Provocation.

Id. at 558-59.

We agree with the foregoing analysis and, in our view, application of the "natural and probable consequences" standard in the case of an alleged aider and abettor to armed premeditated murder cannot be reconciled with Judge Moylan's reasoning, which posits that each participant's responsibility in a criminal homicide must turn on his or her individual intent or *mens rea*. Here, appellants were convicted of premeditated murder without any requirement that the prosecution prove the requisite premeditation, deliberation, or intent. This could not be done consistently with *Peoni*, and the "natural and probable consequences" doctrine cannot be permitted to dilute the principle that the *mens rea* required to prove premeditated murder, whether by a principal or by an accomplice, necessarily includes premeditation, deliberation, and a specific intent to kill.

The *Peoni* standard is widely regarded by legal scholars as logical and just. Professor LaFave and the authors of the Model Penal Code have recognized that a "natural and probable consequences" rule imposes liability on an accomplice for the crime committed by the principal on the basis of the accomplice's negligence. n32 At least in the present context, we agree with Professor LaFave that a negligence-based approach contravenes basic notions of criminal responsibility:

> The "natural and probable consequence" rule of accomplice liability, if viewed as a broad generalization, n33 is inconsistent with more fundamental principles of our system of criminal law. It would permit liability to be predicated upon negligence even when the crime involved requires a different state of mind. Such is not possible as to one who has personally committed

> a crime, and should likewise not be the case as to those who have given aid or counsel.
>
> . . .
>
> [G]eneral application of the "natural and probable consequence" rule of accomplice liability is unwarranted. *A*'s guilt as an accomplice to one crime should not *per se* be a basis for holding *A* accountable for a related crime merely because the latter offense was carried out by *A*'s principal, for this as well would result in *A*'s guilt of a crime as to which he did not have the requisite mental state.

LAFAVE, § 13.3(b) at 362-63. n34

> n32 *See* LAFAVE, § 13.3 (b) at 362; *see also* MODEL PENAL CODE & COMMENTARIES § 2.02 at 241 n.24 (describing the "natur[al] or probable consequences" rule as one of "negligence").
>
> n33 As previously noted, however, this generalization does not apply to felony murder, misdemeanor manslaughter, or conspiracy, all of which the law treats differently.
>
> n34 Of course, in this case, the trial court's instruction would not have permitted appellants to be convicted of premeditated murder solely because they were negligent. Even with the inclusion of the words "criminal venture," the prosecution was required to prove criminal intent, *i.e.*, an intent, at least, to assault. But once the intent to commit the lesser offense had been established, then, in conformity with the trial court's charge, a defendant's failure to appreciate the

> natural and probable consequences of her conduct -- essentially a negligence standard -- could support her conviction of the far more serious crime charged in the indictment, namely, armed first-degree premeditated murder.

Moreover, it is illogical to hold an accomplice criminally liable for an offense when the accomplice's guilt of that offense stems from his or her negligence:

> To say that the accomplice is liable if the offense . . . is "reasonably foreseeable" or the "probable consequence" of another crime is to make him liable for negligence, even though more is required in order to convict the principal actor. This is both incongruous and unjust.

Model Penal Code & Commentaries § 2.06 at 312 n.42. n35

> n35 As noted previously, we agree with the analysis in *Oates*, which bases the degree of culpability of each participant in the crime on that participant's mental state. But application of a lesser standard of proof in the prosecution of an accomplice than of a principal, solely because she is an accomplice, is not only contrary to the *Oates* analysis, but is also in tension with the historical purpose of previous distinctions between parties, which was "to mitigate the harshness of the common law when all felonies carried the same sanction -- death" -- by "punish[ing] . . . the aiders and abettors . . . less severely." Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 Fordham L. Rev. 1341, 1357 (2002).

A rule imposing criminal liability upon an accomplice for foreseeable consequences, without proof that

the accomplice intended those consequences (while, by contrast, a principal must be shown to have the proscribed intent), is also contrary to the underlying purpose of aiding and abetting statutes, which is to "abolish the distinction between principals and accessories and [render] them all principals." *Standefer v. United States, 447 U.S. 10, 19, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980).* Enforcing statutory *mens rea* requirements with respect to principals, while applying a negligence-based standard to accomplices, requires the court to make the very kinds of distinctions which the law was intended to eliminate:

> If the mental state for the principal is allowed to differ . . . from that for the aider and abettor or the causer, then the jury would have to first determine in each instance whether the defendant is an aider and abettor . . . or a principal, in order to know which mental state to apply. Requiring the jury to make those distinctions effectively resurrects the pre-1901 state of the law, and stands in direct contradiction to the "no distinction" rule.

What Were They Thinking?, 70 Fordham L. Rev. at 1365, supra note 35. As Judge Moylan suggested in *Oates*, guilt or the degree of guilt should turn on the mental state of each participant in the crime, and the requisite proof should not automatically be made less demanding for the prosecutor to achieve vis-a-vis one perceived to be an accomplice than with respect to a codefendant alleged to be the principal.

Focusing on the present appeals, it is particularly inappropriate to permit the conviction of an aider or abettor upon a lesser showing of criminal intent than is required vis-a-vis a principal when the defendants are being prosecuted for homicide. The District's statutory scheme is designed to relate the degree of the crime and the punishment of the defendant to his or her individual intent. In *Comber v. United*

States, 584 A.2d 26 (D.C. 1990) (en banc), this court, as part of a comprehensive examination of the District's homicide laws and of the mental state required for each form of the offense, reaffirmed that it would not be enough, in order to convict a defendant of, *e.g.*, first-degree murder, that the risk of death was reasonably foreseeable. *Id. at 39 n.12.* n36 We therefore conclude that it serves neither the ends of justice nor the purposes of the criminal law to permit an accomplice to be convicted under a reasonable foreseeability standard when a principal must be shown to have specifically intended the decedent's death and to have acted with premeditation and deliberation, and when such intent, premeditation, and deliberation are elements of the offense.

> n36 Evidence of malice is sufficient, however, to support a conviction for second-degree murder, if the defendant's conduct involved "such wanton and willful disregard of an unreasonable human risk as to constitute malice aforethought even if there is not actual intent to kill or injure," or if "the perpetrator has the specific intent to inflict serious bodily harm" (but not the specific intent to kill). *Comber, 584 A.2d at 38-39* (quoting R. PERKINS & R. BOYCE, CRIMINAL LAW 59 (3d ed. 1982)); *see also Wheeler v. United States, 832 A.2d 1271, 1274 (D.C. 2003).*

Finally, District of Columbia law treats a killing as first-degree murder, without requiring proof of intent to kill, only under two carefully circumscribed doctrines: felony murder and conspiracy. n37 Our felony murder statute, *D.C. Code § 22-2101*, imposes criminal responsibility for first-degree murder in the case of a reasonably foreseeable killing, without a showing that the defendant intended to kill the decedent, if the homicide was committed in the course of one of several enumerated felonies. The statute also makes any

purposeful killing during the course of any felony first-degree murder. This doctrine is premised on the notion that malice may be presumed from the commission of certain "dangerous" or "violent" felonies that "generally involve[] a risk that . . . someone might be killed." LAFAVE, § 14.5 (a) at 446. Felony murder is a "special crime of peculiar magnitude deemed to warrant proof by unique fashion." *Shanahan v. United States, 354 A.2d 524, 526 (D.C. 1976).* Holding an accomplice, but not a principal, criminally liable for *all* unintended foreseeable killings stemming from *any* intentional crime, including less serious felonies and even misdemeanors, creates an illogical distinction between the two kinds of participants, and it cannot be reconciled with the carefully considered limits to the reach of the felony murder statute, specified by the legislature. n38

n37 We address the *Pinkerton* doctrine of conspirator liability in Part III.D., *infra.*

n38 To avoid any misunderstanding, nothing in our opinion casts doubt on the propriety of the instruction which the trial judge gave, as part of the general intent instruction applicable to both defendants, to the effect that a jury may -- but is not required to -- infer that "a person intends the natural and probable consequences of [his or her] acts knowingly done or knowingly omitted." As the Public Defender Service points out, this (permissive) common-law presumption does not distinguish between principals and accomplices, nor does it expand the liability of one but not of the other. Rather, to the extent that it applies to accomplices, it does so as a logical part of its application to all defendants.

D. *The Pinkerton doctrine.*

In its brief to the en banc court, the government contends, for the first time, n39 that "it is difficult to draw a principled distinction" between the "natural and probable consequences" rule in the aiding and abetting context and the "parallel doctrine of *Pinkerton* liability." Contrary to the government's position, however, both the Supreme Court and this court have drawn that very distinction, and have emphasized that *Pinkerton* liability and aiding and abetting are distinct legal theories that require proof of different elements. As a result, concepts that are applicable in the *Pinkerton* context "may not be transposed to the related but distinctively different context of aiding and abetting." *Erskines v. United States, 696 A.2d 1077, 1080 (D.C. 1997)* (emphasis added).

n39 The government did not raise *Pinkerton* liability in the trial court with respect to the premeditated murder charge, and the jury was not instructed on the elements of *Pinkerton.* The government likewise did not refer to *Pinkerton* before the division at all; indeed, the table of contents of the government's brief to the division does not include a citation to *Pinkerton.* Although the government claims that a grant of rehearing en banc "turns the clock back to zero," it cites no authority for this proposition, and there is a substantial body of law to the contrary. *See, e.g., Thaddeus-X v. Blatter, 175 F.3d 378, 403 n.18 (6th Cir. 1999)* (per curiam) (en banc); *Miller v. Texas Tech Univ. Health Sciences Ctr., 421 F.3d 342, 348-49 (5th Cir. 2005)*; 16 A. CHARLES ALAN WRIGHT, *ET AL.*, FEDERAL PRACTICE AND PROCEDURE § 3986.1, at 731-32 & n.8 (1999). Indeed, this court has stated that arguments in a petition for rehearing or rehearing en banc that were not presented to the division are "ordinarily . . . deemed to have been

waived when they are not properly raised in the first instance." *Breezevale, Ltd. v. Dickinson, 783 A.2d 573, 575 (D.C. 2001)* (en banc); *see also Majerle Mgmt., Inc. v. District of Columbia Rental Hous. Comm'n, 777 A.2d 785 (D.C. 2001)* (per curiam)

Our statement in the order granting rehearing en banc, *Wilson-Bey II, 886 A.2d at 78*, that the opinion and judgment in *Wilson-Bey I* are vacated and that the parties' new briefs "shall be specifically designed for consideration by and addressed to the en banc court and shall supersede all briefs previously filed in these appeals," was a routine directive, and it was not designed to alter the normal rules of law governing the preservation of claims. Nevertheless, appellants and the Public Defender Service have had the opportunity to address the *Pinkerton* doctrine on the merits in their reply briefs, and we are satisfied that there has been no procedural unfairness. Moreover, the government's invocation of *Pinkerton* for the first time in its brief to the en banc court might reasonably be viewed not as an impermissible new "claim," but rather as a permissible new argument in support of a previously made and preserved claim. *See Yee v. City of Escondido, 503 U.S. 519, 534, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992)*. Accordingly, we are prepared to address the government's contention on its merits.

As articulated by this court, the *Pinkerton* doctrine provides that "a co-conspirator who does not directly commit a substantive offense may [nevertheless] be held liable for that offense if it was committed by another co-conspirator in furtherance of the conspiracy and was a reasonably foreseeable consequence of the conspiratorial agreement." *Gordon v. United States, 783 A.2d 575, 582 (D.C. 2001)*. Thus, in order to secure a conviction in conformity with

Pinkerton, the prosecution must prove that an agreement existed, that a substantive crime was committed by a co-conspirator in furtherance of that agreement, and that the substantive crime was a reasonably foreseeable consequence of the agreement between the conspirators. *Pinkerton, 328 U.S. at 646-47*; *Gordon, 783 A.2d at 582*. The government is not, however, required to establish that the co-conspirator actually aided the perpetrator in the commission of the substantive crime, but only that the crime was committed in furtherance of the conspiracy.

To establish a defendant's criminal liability as an aider and abettor, on the other hand, the prosecution need not show that an agreement existed between the principal and the accomplice. Rather, as we have seen, the government must prove, in conformity with *Peoni*, that the accomplice "in some sort associate[d] himself with the venture, that he participate[d] in it as in something he wishe[d] to bring about, [and] that he [sought] by his action to make it succeed." *Peoni, 100 F.2d at 402*.

In *Nye & Nissen*, the Supreme Court, in citing with approval the *Peoni* standard, recognized that *Pinkerton* liability differs fundamentally from liability for aiding and abetting. The Court explained the distinction as follows:

> The rule of [*Pinkerton*] does service where the conspiracy was one to commit offenses of the character described in the substantive counts. *Aiding and abetting has a broader application. It makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy.* And if a conspiracy is also charged, it makes no difference so far as aiding and abetting is concerned whether the substantive offense is done pursuant to the conspiracy. *Pinkerton* . . . is narrow in its scope.

> Aiding and abetting rests on a broader base; it states a rule of criminal responsibility for acts which one assists another in performing. The fact that a particular case might conceivably be submitted to the jury on either theory is irrelevant. It is sufficient if the proof adduced and the basis on which it was submitted were sufficient to support the verdict.

336 U.S. at 620 (emphasis added). This court recognized the same distinction in *Erskines*, holding that "[a]iding and abetting . . . resembles *Pinkerton* liability but nonetheless differs from it significantly," because, among other things, aiding and abetting requires proof that the defendant "*intentionally* participated" in the principal's crime. *696 A.2d at 1080-81* (emphasis added).

Although the government, as we have seen, discerns what it believes to be decisive similarity between the "natural and probable consequence" standard applied by the trial judge in this case and the "reasonable foreseeability" standard of *Pinkerton*, the proposed analogy cannot withstand critical scrutiny. Reasonable foreseeability is only one of the elements that the government must prove to support a conviction under *Pinkerton*. Pursuant to that doctrine, as we have seen, the government must also prove both that an agreement existed and that the substantive offense was committed by a co-conspirator in furtherance of that agreement. By contrast, in the aiding and abetting context, the "natural and probable consequence" standard as applied by the trial court in this case would make the aider and abettor responsible for all reasonably foreseeable crimes committed by the principal, regardless of whether there was any agreement to commit these crimes or, if there was such an agreement, irrespective of whether the principal's actions were in furtherance of it. We therefore agree with counsel for Ms. Marbury that "the extension of the 'natural and probable

consequences' rule to the aiding and abetting context eliminates the other substantive limitations that make the 'reasonably foreseeable' element appropriate in the context of *Pinkerton* liability, effectively conflating the two doctrines into one omnibus and sprawling theory of vicarious criminal liability."

As we have previously noted in a different context, there are two narrowly defined doctrines that permit conviction for unintended crimes that result from intentional participation in a predicate crime, without proof of the *mens rea* otherwise required for the subsequent crime. These doctrines are felony murder and conspirator liability under *Pinkerton*. Legislatures, and sometimes courts, have carved out these exceptions to address specific especially dangerous circumstances: commission of certain serious felonies that inherently create a high risk of homicide, or participation in crimes that depend for their execution on conspiratorial agreements. Where these or similar special circumstances do not exist, *e.g.*, in cases, such as this one, which was prosecuted on an aiding and abetting theory, the *raison d'etre* for these exceptions does not apply. Significantly, under these carefully circumscribed doctrines, principals and accomplices are treated alike on the basis of each participant's mental state. *Accord, Oates, 627 A.2d at 558-59.* Accomplices are not treated more harshly than principals -- *i.e.*, they are not subject to conviction on a less demanding standard of proof -- solely because they are accomplices. We agree with the Public Defender Service that these narrow exceptions "prove the rule" that, in first-degree murder prosecutions which are neither for felony murder nor based upon the *Pinkerton* doctrine, a showing of *mens rea* is essential; under the government's approach, on the other hand, the exceptions swallow the rule.

Each of the two special doctrines has a unique rationale that does not exist in the markedly different context of accomplice liability. n40 The rationale of *Pinkerton*, which

imposes liability on members of a conspiracy for certain acts of co-conspirators, turns on the existence of a criminal agreement. "'[T]he agreement is the 'essence' or 'gist' of the crime of conspiracy." LAFAVE, § 12.2 (a) at 266. A criminal conspiracy is an offense "of the gravest character" that implicates concerns beyond the commission of the substantive crime which is the object of the conspiracy:

> A conspiracy is a partnership in crime. It has ingredients, as well as implications, distinct from the completion of the unlawful project. . . . . "For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered."

Pinkerton, 328 U.S. at 644 (quoting *United States v. Rabinowich, 238 U.S. 78, 35 S. Ct. 682, 59 L. Ed. 1211 (1915)).*

> n40 The purpose of the felony-murder rule, as we have explained, is to deter certain enumerated and especially dangerous felonies targeted by the legislature, because the commission of these particular crimes poses an especially high risk that death will result.

Foreseeable acts of co-conspirators in furtherance of a conspiracy are imputed to the conspirator-defendant because the co-conspirators are deemed by the law to be his agents. *Baker v. United States, 867 A.2d 988, 1005 (D.C. 2005).* In principle, the law treats the co-conspirator as the conspirator-defendant's *alter ego*, and presumes him to be bound by the pre-existing conspiracy to achieve his fellow co-conspirators' shared objectives. This court has recognized the uncommon character of this aspect of conspiracy law:

> Conspiracy is a unique theory of liability that renders individual defendants guilty of any offense committed by co-conspirators in furtherance of the conspiracy. . . . Special evidentiary rules apply where a conspiracy is charged or alleged, and hearsay evidence . . . may be introduced against a co-conspirator under the exception for admissions or statements of party opponent on the theory that one co-conspirator is the agent of another. . . . [*B*]*ecause the agency theory underlies conspiracy liability*, the only admissions of party opponent admissible in a trial where the government seeks to assign vicarious liability to co-conspirators are those statements and acts of a co-conspirator *made during and in furtherance of the conspiracy*.

Akins v. United States, 679 A.2d 1017, 1028 (D.C. 1996) (emphasis added) (citations omitted).

In contrast, a principal is not an accomplice's agent, and criminal liability attaches to the accomplice even if there is no preexisting conspiratorial agreement between the two. When the judge delivers the standard aiding and abetting instruction, he or she specifically admonishes the jury that

the prosecution need not prove any prior agreement to commit the crime. *See* Redbook Instruction No. 4.02 (government need not "prove that anyone discussed or agreed upon" the criminal goal). While, in a particular case, an accomplice may also be a co-conspirator, that dual role simply permits the government to proceed on alternative theories. That the prosecution may do so, however, does not mean that the two legal doctrines have collapsed into one another.

Finally, in the present case, the government did not pursue a *Pinkerton* theory in the trial court (or, for that matter, before the division). It is therefore beyond dispute that the jury was not instructed on *Pinkerton* liability, nor did it make the findings necessary to support a conviction under that theory. In its brief to the en banc court, the government expressly concedes this point ("To be clear, we do not contend that the jury in this case was instructed on *Pinkerton* liability and made all of the *Pinkerton* findings in precisely those terms."). In particular, the jury did not find, nor was it asked to find, that the premeditated murder was committed "in furtherance of" the conspiracy, as required under *Pinkerton*. This concession by the government further undermines its *Pinkerton* argument and renders it untenable. Because the jury was not instructed on the elements of *Pinkerton* liability, a conviction for premeditated murder may not be sustained on that basis. n41

n41 The government's position also rests on the premise that the *Pinkerton* doctrine would necessarily allow Ms. Marbury to be convicted of premeditated murder even if she conspired only to assault Ms. Blackwell. The authorities on which the government relies for this proposition do not necessarily establish that the government's view is correct. Rather, the courts in these cases have sustained *Pinkerton* liability for premeditated murder only upon a finding that the

> defendant entered into a conspiracy *the object of which was to kill. See, e.g., United States v. Sampol, 204 U.S. App. D.C. 349, 403-04, 636 F.2d 621, 675-76 (1980)* (*Pinkerton* liability imposed for murder of Chilean ambassador and American associate because "the object of the conspiracy was the deliberate and premeditated murder" of the former); *Thomas, 748 A.2d at 937* (*Pinkerton* liability imposed where "the assault that was the object of the conspiracy was an assault with intent to kill, not a simple assault").

E. *The constitutional nature of the error.*

Ms. Wilson-Bey's attorney argues in his brief to the en banc court that "[t]he instructional error in this case is constitutional error because it eliminated the specific intent, premeditation and deliberation elements of first-degree murder[;] therefore, the *Chapman* n42 test should apply to this case." Counsel for Ms. Marbury, while acknowledging that they argued for the *Kotteakos* n43 standard before the division, have since changed their minds:

> Having further considered the matter, Ms. Marbury now believes that the proper standard is actually constitutional harmless error under *Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)*, which requires reversal unless the error is "harmless beyond a reasonable doubt." *Id. at 24*. This is because the trial court's instructions had the effect of eliminating the mental state element of the offense from the jury's consideration. In these circumstances, the Supreme Court has made it clear that the error is of constitutional dimension, and consequently that the *Chapman*

harmless error standard should apply. *See Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)* (applying *Chapman* standard where court's instruction omitted element of offense.)

n42 *Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).*

n43 *Kotteakos v. United States, 328 U.S. 750, 764-65, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).*

The Public Defender Service, as *amicus curiae*, agrees with appellants:

Because the District's aiding and abetting statute requires proof that an accomplice acted with the mental state necessary to convict her as a principal, the government here was required to prove, in order for the jury to find Ms. Marbury guilty of first-degree murder, that she acted with a specific intent to kill after premeditation and deliberation. *See D.C. Code § 22-2101*; Redbook Instruction 4.17. But Instruction 4.02 instead required the jury to find her guilty upon proof that the murder was a "natural and probable consequence" of her involvement in a plan to assault Ms. Blackwell. By omitting three essential *mens rea* elements of the offense, the instruction violated the *Sixth Amendment. See White v. United States, 613 A.2d 869, 872 (D.C. 1992)* (en banc). . . . The Court reviews such

> errors under the harmless-beyond-a-reasonable-doubt standard of [Chapman].

The government has vigorously defended the trial court's "natural and probable consequences" instruction. It has not, however, contested the proposition that if the state-of-mind elements of premeditated murder apply to aiders and abettors, then the error was of constitutional magnitude and implicates the *Chapman* standard of "harmless beyond a reasonable doubt." n44 The government likewise has not argued that Ms. Marbury has waived this point, and we agree with the now essentially uncontested proposition that the *Chapman* standard applies.

> n44 In the 44th footnote to its brief, the government states: "[W]e do not mean to suggest that we are necessarily conceding that this instructional error implicates constitutional concerns." The brief contains no additional argument on the point.

F. *Harmless error analysis.*

(1) *Ms. Marbury.*

Ms. Marbury, supported by the Public Defender Service, contends that the trial judge's instructional error was prejudicial to her, rather than harmless beyond a reasonable doubt. n45 Although the case against Ms. Marbury was a strong one, we are constrained to agree.

> n45 The government did not argue to the division that any error was harmless, and cited neither *Kotteakos* nor *Chapman* in its brief. Arguably, the government therefore waived the point. *See Randolph v. United States, 882 A.2d 210, 222-23 (D.C. 2005)*, and authorities there cited. Because the government

> did make the argument in its brief to the en banc court, and because both appellants had ample opportunity to respond, we are prepared, in the exercise of our discretion, to entertain the government's argument on its merits.

The division unanimously concluded, and so do we, that the government's evidence, if credited, "would permit an impartial jury to find that both appellants set out deliberately to murder Ms. Blackwell in retaliation for her having beaten up Ms. Marbury, and that Ms. Wilson-Bey executed this premeditated plan." *Wilson-Bey I*, *871 A.2d at 1157-58*. Indeed, Teresa Brown testified that Ms. Marbury had openly stated her intention to kill "that bitch," referring to the decedent, and if Ms. Brown's testimony is credited, and if the record is viewed, as it must be for sufficiency purposes, in the light most favorable to the prosecution, then the elements of deliberation, premeditation, and specific intent to kill have been readily satisfied.

But "[m]ere sufficiency of the evidence does not dictate a finding of harmless error." *Bell v. United States*, *801 A.2d 117, 129 (D.C. 2002)*. Even under the less rigorous standard of *Kotteakos*, "analysis under the harmless error doctrine should not be limited to superficial inquiry as to whether the same verdict would have been possible absent the tainted evidence." n46 [*Raymond*] *Brooks v. United States*, *367 A.2d 1297, 1309 (D.C. 1976)*; *see also Clark v. United States*, *593 A.2d 186, 192 (D.C. 1991)*. To conclude that an error is harmless, we must find it "*highly probable* that [that] error did not contribute to the verdict." *United States v. Tussa*, *816 F.2d 58, 67 (2d Cir. 1987)* (emphasis added) (quoting *United States v. Corey*, *566 F.2d 429, 432 (2d Cir. 1977)*); *Clark*, *593 A.2d at 192*; *see also In re Ty.B.*, *878 A.2d 1255, 1267 (D.C. 2005)*. In the present case, as we have seen, the issue is whether the error was harmless beyond a reasonable doubt,

and the foregoing authorities apply *a fortiori* in Ms. Marbury's favor.

n46 Or, in this case, the tainted instructions.

In our view, the government has not satisfied the *Chapman* standard vis-a-vis Ms. Marbury. Ms. Marbury argues that her inebriation warrants reversal. Voluntary intoxication "may nega[te] the ability of the defendant to form the specific intent to kill, or the deliberation and premeditation necessary to constitute first-degree murder in which event there is a reduction to second-degree murder." *Harris v. United States, 375 A.2d 505, 508 (D.C. 1977)* (citing *Bishop v. United States, 71 App. D.C. 132, 136, 107 F.2d 297, 301 (1939))*. The evidence required to support a voluntary intoxication defense, however, is quite exacting -- the record must demonstrate "such a degree of complete drunkenness that a person is incapable of forming the necessary intent essential to the commission of the crime charged." *Smith v. United States, 309 A.2d 58, 59 (D.C. 1973); see also Powell v. United States, 455 A.2d 405, 412 (D.C. 1983)*. n47 Although there was extensive testimony regarding Ms. Marbury's drinking and state of intoxication at the time of her fight with Ms. Blackwell and also when she first determined to seek revenge, the effects of the intoxication may well have dissipated by the time of the murder hours later. But even if we assume that Ms. Marbury had the capacity to form the requisite specific intent and to deliberate upon and premeditate a murder, the "cooperating witnesses" testified that appellants and their friends went to Ms. Blackwell's house to find out why Ms. Marbury was beaten up and to fight the decedent and her friends. None testified that there was any plan to kill Ms. Blackwell, and one of the women explicitly denied that the group harbored an intent to kill. Teresa Brown's testimony that Ms. Marbury had declared her intent to kill Ms. Blackwell was, as we have

observed, see note 4, *supra*, subject to substantial impeachment. Thus, taking the evidence as a whole, an impartial juror might readily have a reasonable doubt whether Ms. Marbury in fact formed an intent to kill Ms. Blackwell, as distinguished from an intent to join with others in beating up Ms. Blackwell and her friends. Under the trial court's "natural and probable consequences" instruction, however, a juror who believed that Ms. Marbury's intent was merely to join in an *assault* on Ms. Blackwell could nevertheless reasonably find Ms. Marbury guilty of aiding and abetting armed *premeditated* murder. The error was therefore potentially decisive, and we cannot say, with respect to Ms. Marbury, that it was harmless beyond a reasonable doubt.

> n47 "[T]here must be evidence of the type and quantity of alcohol consumed, the length of time during which it was consumed, and the specific manner in which the consumption made the defendant incapable of acting with specific intent." *Washington v. United States*, 689 A.2d 568, 574 (D.C. 1997).

(2) *Ms. Wilson-Bey.*

Some time after taking a beating from Tomika Blackwell, Ms. Marbury arrived with four of her friends at Ms. Wilson-Bey's home. Ms. Marbury related to her older sister that Ms. Blackwell and her friends had "jumped" her, and Ms. Wilson-Bey looked at Ms. Marbury's injuries, which, as we have noted, included a bloody nose, a busted lip, an injured eye, and a knot on her head. Ms. Wilson-Bey then interrupted Ms. Marbury's narrative, went into the kitchen, grabbed a knife, and told the other women that "I am going to kill that bitch." She subsequently announced that she was going to "fuck one of them up," obviously meaning Ms. Blackwell.

When the group arrived at Ms. Blackwell's apartment house, Ms. Wilson-Bey was one of the three women who

rushed up to the decedent's unit, and she immediately spoke for the group, telling Mr. Rucker that she wanted to see Tomika. When an apparently unintimidated Ms. Blackwell came to the door, announced her presence, and advanced towards Ms. Wilson-Bey, the latter stabbed her near her eye. The two women struggled, and different witnesses estimated that Ms. Wilson-Bey swung her knife at the decedent "at least three times" and "four or five times," causing the victim's blood to flow "everywhere." Subsequently, the group left Ms. Blackwell in a gravely wounded condition and proceeded to Teresa Brown's house, where, according to the testimony, Ms. Wilson-Bey yelled at her: "Come outside, bitch, I'm going to kill you." Finally, Ms. Wilson-Bey made a telephone call to her brother and, in order to ensure that no one would betray her by reporting her deeds to the authorities, she gave him the names of all of the participants in the night's violence.

With respect to the killing itself, Ms. Wilson-Bey was obviously the leader of the group that went to Ms. Blackwell's home to avenge the beating of Ms. Marbury. She was charged with premeditated murder as a principal, on the theory that she was the killer, while the government took the position that Ms. Marbury was an aider or abettor. Some doubt was cast by the medical evidence, however, on the government's theory that it was Ms. Wilson-Bey who inflicted the fatal wound. The medical examiner, testifying for the prosecution, found numerous stab wounds on the decedent's body. One of the wounds, five to six inches deep, and one half-inch long, transected Ms. Blackwell's jugular vein, penetrated her lung, and resulted in her death. A forensic pathologist called by Ms. Wilson-Bey testified that Ms. Blackwell's wounds were caused by at least two different knives, that the fatal wound was inflicted with a knife that had a narrow blade, and that a large knife, such as the one said to have been wielded by Ms. Wilson-Bey, would not have produced that wound. Ms. Wilson-Bey's attorney argues that his client therefore could not have killed Ms. Blackwell.

and that if she participated in the killing at all, it was only as an aider and abettor. Therefore, counsel maintains, Ms. Wilson-Bey was prejudiced by the erroneous instruction regarding the elements of accomplice liability. Moreover, although the government principally argued that Ms. Wilson-Bey was the principal in the killing, the prosecutor also told the jury that both appellants could be found guilty on an aiding and abetting theory.

The evidence that Ms. Wilson-Bey played a leading role in the murder of Ms. Blackwell was overwhelming. "Carrying the murder weapon to the scene of the crime n48 'is highly probative of premeditation and deliberation . . . as it permits the inference that appellant arrived on the scene already possessed of a calmly planned and calculated intent to kill.'" *Mills, 599 A.2d at 782* (quoting *McAdoo v. United States, 515 A.2d 412, 427 (D.C. 1986))*. Whether the instructional error was harmless beyond a reasonable doubt boils down to whether an impartial juror could reasonably conclude that Ms. Wilson-Bey did not kill (or help to kill) the decedent with deliberation, premeditation, and the specific intent to cause her death.

> n48 Or, in this case, carrying a potential murder weapon with which the decedent was stabbed several times. Several women also carried weapons to the scene, but the evidence against Ms. Wilson-Bey -- that she threatened to kill Ms. Blackwell, brought a butcher knife to the scene, and repeatedly stabbed the decedent -- is more compelling than the evidence against any of Ms. Wilson-Bey's confederates.

The government discerns no difficulty in answering that question in the negative. It asserts, in a footnote to its en banc brief, that no reasonable juror could find in her favor:

> Because [Ms.] Wilson-Bey was tried as the principal and the evidence showed that she repeatedly plunged her knife into Ms. Blackwell after earlier declaring her desire to "kill," it is impossible to perceive how the aiding-and-abetting instruction could have harmed her. At any rate, as our recitation of the facts demonstrates, the overwhelming evidence established beyond a reasonable doubt that [Ms.] Wilson-Bey traveled to Atlantic Street with the intent to kill Ms. Blackwell and that she did so with premeditation and deliberation.

We think that the government's assessment of the record as to this appellant is consistent with, and indeed compelled by, common sense. Any impartial trier of fact who credited the prosecution's evidence n49 would, in our view, be bound to conclude that Ms. Wilson-Bey intended to kill the decedent, tried to kill her, and succeeded in doing so, either by personally causing her death or by abetting a knife-wielding confederate who actually inflicted the fatal wound if Ms. Wilson-Bey did not. To quote *Peoni*, Ms. Wilson-Bey, at the very least, intended that the decedent be killed, and she "participated in [the killing] as in something that [s]he wishe[d] to bring about, that [s]he [sought] by [her] action to make it succeed." *100 F.2d at 402*. In sum, we conclude that as to Ms. Wilson-Bey, the instructional error was harmless beyond a reasonable doubt, and that revision of the instruction on aiding and abetting to conform to the standard that we have now adopted would not have affected the jury's verdict as to her. n50

> n49 The convictions of both appellants of, *inter alia*, aggravated assault while armed demonstrate that the jury accepted the largely uncontradicted testimony of the government's witnesses regarding the manner in which the crime was committed.

n50 If the jury reached the aiding and abetting theory as to Ms. Wilson-Bey, the natural and probable consequences instruction obviously permitted conviction upon less evidence than an instruction requiring proof of deliberation and premeditation would have done. We discern no reasonable doubt, however, that the outcome under a correct instruction would have been the same.

IV.

CONCLUSION

For the foregoing reasons, we remand the case to the trial court with directions to vacate both appellants' convictions of assault with a dangerous weapon. See note 3, *supra*. Ms. Wilson-Bey's remaining convictions are affirmed. Ms. Marbury's conviction of premeditated murder while armed is reversed, and the case is remanded for further proceedings consistent with this opinion; n51 Ms. Marbury's other convictions are affirmed. With respect to those contentions of the appellants which are not explicitly addressed in this opinion, the en banc court reaffirms and adopts the conclusions reached by the division in *Wilson-Bey I, 871 A.2d at 1166 n.20*.

n51 The government has not requested, in the alternative, that we enter judgment on the lesser included offense of second-degree murder as to Ms. Marbury, and in the absence of briefing or argument on the issue, we do not decide whether such a course would be appropriate. *But see, e.g., Willis v. United States, 692 A.2d 1380, 1382-83 (D.C. 1997)* (despite absence of language in appellate mandate "that the government could elect between retrial and judgment on a lesser included offense," trial court on remand

properly entered such judgment where "the lesser included offense . . . was not affected by the error causing reversal"). See also note 36, *supra*, discussing the evidence required to prove second-degree murder, and Part III F (1), at pp. 43-45, *supra*, addressing the appropriate disposition if a defendant is too intoxicated to be able to form the specific intent required for premeditated murder.

So ordered.